NCBA Bank Kenya PLC (Formerly NIC Bank Kenya PLC) v Okonya (Civil Appeal E116 of 2022) [2024] KEHC 6251 (KLR) (Civ) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6251 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E116 OF 2022

DKN MAGARE, J

MAY 24, 2024

BETWEEN

NCBA BANK KENYA PLC (FORMERLY NIC BANK KENYA PLC) ..... APPELLANT

AND

BERNARD NJENGA OKONYA ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the judgments of the Hon. E.M. Kagoni given in Nairobi Milimani CMCC 4818 of 2015 given on 27/7/202. The appellant was the plaintiff's predecessor in the lower court. (NIC Bank Kenya PLc.

2. The court dismissed the claim in limine the Appellant filed 7 grounds of Appeal as follows: -

    a. The Learned Magistrate erred in both fact and in law in dismissing the Appellant's claim on account of non- registration of the Chattels Mortgage Agreement, when it is apparent and common ground that the Appellant's suit was for recovery of debt owed by the Respondent and not enforcement of the security under the Chattels Mortgage agreement.

    b. The Learned Magistrate erred in law in dismissing the Appellant's claim based on the erroneous finding that the Chattels Transfer Agreement was fraudulent and void despite the Court's recognition that failure to register to register the Chattels transfer instrument remains a contract inter parties.

    c. The Learned Magistrate misapprehended, misconceived, and misapplied the provisions of Sections 13 and 17 of the Chattels Mortgage Agreement by equating the meaning of an

"Assignee" under Section 13 of the act to a "Grantee" and holding that the Appellant is the Assignee when the Appellant is not among the parties contemplated under the said provisions.

d. The Learned Magistrate disregarded and/or ignored the doctrine of stare decis established in principle that failure to register the chattels transfer instrument renders the contract inter parties. Consequently, by ignoring such principle the Trial magistrate arrived at a conclusion contrary to the pleaded issues and evidence presented.

e. The Learned Magistrate erred in fact and in law in dismissing the Appellant's suit for recovery of the debt owed by the Respondent despite a clear admission of debt.

f. The Learned Magistrate erred in fact in adopting the position that neither of the parties in the suit had filed their Written Submissions when the Appellant had filed and served their submission on 12th May, 2022.

g. The Learned Magistrate erred in fact in failing to consider the Appellants' Written Submission dated 11th May, 2022 and filed on 12th May, 2022.

Pleadings

3. The appellant filed suit over an amount of Kshs. 3,999,000 which was given to enable the Respondent acquire motor vehicle registration No. KBZ 036H Tata tipper. The Appellant stated that the Respondents was bound to pay monthly installments. The appellant is said to have failed to adhere to the chattel mortgage wherein the tipper was repossessed and sold at Kshs. 3,050,000/. A sum is Kshs. 1,142,456 was still due as at 6/2/18. They claimed the said amount. A statement by Ibrahim Mbogo was filed detailing how the said amount arose. The respondent filed defence. They stated that there was never a valid agreement. To them failure to register made the agreement null and void. They stated that the financing was not for them but for a third party.

4. On 26/4/2019 the Respondent sought leave to join Job Kamau Mburua as Third Party. The Defence was filed on 13/7/2018 just denying owing Kshs. 1,142,456. It does not deal with why they do not owe. This is crucial in view of the established precedent on debts.

5. They also went into length on the chattels transfer Act, and Registration of documents. In the alternative they state that the financing was done on behalf of a third party. They indicated that they referred the right to counter claim upon being furnished with better particulars.

Evidence

6. Ebrahim Mbogo adopted this statement. He was stood down. On 12/4/2022 he now testified as Ibrahim Ngatia and produced a concurrent at exhibit 1- 9. An issue on the resolution to sue was raised. He was cross examined on the chattel mortgage's registration. The said amount due between the parties and penalties that were unpaid. On 20/4/2022 the respondent testified that and adopted his statement. He stated that he was not served with the registered chattel mortgagee. He did not know how much the vehicle was sold for during repossession. He stated on cross examination that the loan was disbursed. And he had not sought accounts.

7. Upon hearing the parties the court dismissed the suit. Upon the said dismissal the appellant filed this Appeal.

Analysis

8. I have perused the record of appeal and the submissions filed by the parties in support and opposition to their respective cases. It is not for lack of consideration that I do reproduce the submissions and authorities.

9. Whereas the Appellant submits and urges this court to find that the learned Magistrate erred in dismissing the claim on the basis of non-registration of the chattel mortgage when the suit was for recovery of the debt owed, the Respondent submits that the trial court correctly applied the law and evidence in arriving at the decision to dismiss the claim.

10. The appeal raises rather interesting questions and answers that should not be asked. The court set out in extension Section 17 of the Chattel Transfer Act. The court was live that the same was repealed by dint of the Movable Property Security Rights No 13 of 2017.

11. He stated that the Chattel mortgage was illegal. The illegality must be visited on the Appellant.

12. Parties must be bound by their pleadings. Before they answer a case, they must first ask. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
> >
> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

13. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that:-

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each

party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

14. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

15. In this case the pleadings are by the Appellant seeking a sum of Kshs. 1,142,456. The appellant did not seek any other prayer. The respondent on the other side did not file any counter claim. The respondent only stated that the chattel mortgage was incomplete.

16. The duty of a party seeking a court to make a finding they must plead and then seek to have. There is no claim or counter claim over the status of the mortgagee. I agree with the court that where something is void, it is void for all purposes. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

17. In this case, what was void and what voided the contract? The sequence in which this matter proceed was that money, that Kshs 3,999,059 was disbursed to the Respondent. The amount is what in law is called money had and received. The only defence for such money is that either it was never received or it has been paid. The purpose for which the money was received was irrelevant. This is to say, a sum of Kshs. 3,999,999/= was due and payable together with interest automatically levied or agreed with the

banks. In this case the money was released before a mortgage was entered into. The vehicle was valued and a sum of Kshs. 3,999,000 provided as the cost to be financed.

18. The contract for financing was complete at that point. Whether or not the chattel mortgage or moveable security contract was valid, could only arise if the bank sought to enforce the chattel mortgage. The chattel mortgage has already been engaged and a sum of Kshs. 3,050,00/= recovered.

19. There has been no suit challenging the chattel mortgage of the amounts for which the vehicle was sold. The chattel mortgagee is therefore spent. By invalidating the mortgage without a prayer to do so, the court left its path and proceeded on other frolics. The defence given by the respondent is untenable. There was nothing related to the invalidity of the chattel mortgage in the respondent's phantom counter claim. There was no Defence offered for the sum of Ksh 1.142, 456/=.

20. I am unable to agree that the chattel mortgage was up for discussion. The only issue was whether a sum of Kshs. 1,142,456 was due and owing.

21. I have perused the evidence tendered. The valuation for the vehicle are in the names of the Respondent. The account statement was for the period between 1/1/2016 – 16/2/2018. A sum of Kshs. 1,142,456.30 was due constituting of the principle remaining accrued interest of 68,382, Total penalty Kshs. 261,915 .17. The principle remaining was Kshs 811,701 as at 6/2/2018. These were figures for money received. They have nothing to do with the lorry. There is no question on the property in the bank statement.

22. In a defence filed is a classic evasive defence. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence ..."

23. The defence does not defend the case before court. I have come to the inevitable conclusions that the court fettered its discretion in taking into consideration, irrelevant factors and ignoring an indication that the debt was due and owing.

24. Order 2 Rule 4(1) provides as follows: -

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

25. There are no particulars of illegality or breach of contract that were to pleaded. This is contrary to order 2 rule 10(1) of the Civil Procedure Rules. the same provides as follows: -

1. Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing — (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

26. The court could thus not have deviated from the pleadings. Life could be a lot easier if the courts do not deal with un-pleaded issues. Courts deal with un-pleaded issues when they are left to court and also arise by implication. This was not the case in the instant Appeal. The money was admitted to be due and owing.

27. In the circumstances, I find that the court was wrong in tying the money received and had from a loan to a chattel mortgage, that though related, is a different contract. The chattel mortgage could be useful when dealing with the sale of Motor Vehicle Registration No. KBZ 036H. The appeal is consequently merited and is allowed with costs.

28. Costs are provided under Section 27 of The *Civil Procedure Act* as follows; -

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

29. The Supreme Court set forth 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.

30. The costs follow the event. The event is allowing of the Appeal. Appellant deserves costs. Nothing disentitles them from costs. I award costs of the Appellant of Kshs. 95,000/= and costs of the court below.

Determination

31. The upshot of the foregoing is that I make the following orders: -

    a. The appeal is allowed I set aside the judgment and Decree of the Hon. E.M. Kagoni given in Miliamni CMCC 4818 of 2018 on 27/7/2022. In lieu thereof I allow Appellants suit, enter judgments for a sum of Kshs. 1,142,560. I decline to award interest from 6/2/2018.

    b. I award interest at court rates from 22/5/2018 for payments in full.

    c. Costs of the appeal of Kshs. 95,000 to the Appellant

    d. Cost in the lower court to the appellant

    e. 30 days stay.

    f. File is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Nyanjwa for the Appellant

Miss Njehu for the Respondent

Court Assistant- Brian