Orieny & another v National Bank Of Kenya (Civil Appeal E016 of 2023) [2024] KEHC 6002 (KLR) (20 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6002 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E016 OF 2023

RE ABURILI, J

MAY 20, 2024

BETWEEN

MESHACK ORIENY ..... 1ST APPELLANT

JOYCE ORIENY ..... 2ND APPELLANT

AND

NATIONAL BANK OF KENYA ..... RESPONDENT

(An appeal arising out of the judgment and decree of the Honourable J.N. Wambiliyanga in the Chief Magistrate's Court at Kisumu delivered on the 18th January 2023 in Kisumu No. 48 of 2018)

JUDGMENT

Introduction

1. The appellants Meshak Orieny and Joyce Orieny vide a plaint dated 30th June 2011 filed on the 28th September 2011, sought judgement against the respondent for a declaration that they had finished paying off their loan facility from the respondent and any further charges were thus illegal, a permanent injunction restraining the respondent from disposing off the suit properties as well as damages and costs of the suit.

2. It was the appellants' case that in 1994, they applied for a loan and overdraft facility from the respondent Bank in Nakuru and received a total of Kshs. 600,000 that included Kshs. 400,000 that was to be deducted to repay the overdraft facility. The appellants averred that they deposited title deeds No. Kisumu/West Agoro/359 and Kisumu/Manyatta "B"/337 as security against the borrowed amount.

3. The appellants averred that on the 11th June 2010, they received a letter from the respondent claiming that they had defaulted in payment of the sum of Kshs. 3,924,711 which they asserted that the respondent was fraudulently claiming.

4. The respondent National Bank of Kenya filed a statement of defence dated 9th December 2011 denying the allegations of fraud made by the appellants and praying for the suit to be dismissed.

5. The trial court in its judgment found that the appellants had not proved their case on a balance of probabilities against the respondent and thus dismissed the appellants' suit with costs.

6. The appellants were aggrieved by the decision of the Trial Court. They filed a Memorandum of Appeal dated 24th January 2023 raising the following grounds of appeal:

    1. The learned trial magistrate erred in law and fact by failing to consider the evidence and pleadings on record thereby arriving at a wrong decision.

    2. The learned magistrate erred in law and fact by ignoring the authorities submitted by the appellant in their submissions when arriving at his decision in apportioning liability between parties.

    3. The learned magistrate erred in fact and in law in failing to uphold the doctrine of precedent and as a result arrived in unjustified decision.

    4. That in arriving at her decision, the trial magistrate did so in a speculative and cursory manner not guided by any set of principles and failed to exercise his discretion within the applicable principles of natural justice and fair hearing and his failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.

    5. The learned trial magistrate was biased and did consider the documents tendered by the appellant.

7. The appeal was to be canvassed by way of written submissions but only the appellants filed submissions.

The Appellants' Submissions

8. The appellants' counsel submitted that there was no loan as conceded by the magistrate that the Letter of offer was not produced by the respondent yet she went ahead and made a finding that there was a loan with terms and conditions which was extremely erroneous. It was submitted that loan contracts must be strictly construed and without loan agreement, the respondent could not prove that it advanced any money to the appellants.

9. It was the appellants' submission that the failure to produce a loan agreement by the Respondent and statement of Accounts is consistent with the Appellants' assertion that no loan was advanced and that the Respondents could not even produce any evidence of how much was owed to them because there was nothing owed and as such, the appellants must be given the benefit of doubt as was held in the case of *Scholastica Nyaguthii Muturi v Housing Finance Co. of Kenya Ltd & Another* [2017] eKLR.

10. The appellants further submitted that the offer letter is so important that without it, the Court cannot boldly state that this was a loan granted on terms and allow the defendant to charge figures as they wished. Reliance was placed on the case of *John Muriithi Gacago Nganga v HFCK Limited and Another* Nbi HCCC 15 of 2005 (UR) and *Surya Holdings Limited & 2 others v CFC Stanbic Bank Limited* [2014] eKLR.

11. It was submitted that the moment the Appellants stated that what they had been given was an overdraft, the burden shifted to the Defendant to prove that they offered a loan not overdraft facilities.

The appellants submitted that in this matter the Respondent was the one who testified that they gave the Appellant a loan and it was incumbent upon them to state what loan was given and the terms thereof.

12. The appellants submitted that the receipts attached amounted to Kshs. 264,710 together with other amounts in the statements produced, which were not taken into account by the Magistrate and that the Appellants having stated that they had been given an overdraft of Kshs. 600,000 out of which Ksh 400,000 was deducted to pay the overdraft, there was a balance of Ksh 200,000 which could have easily been cleared by Kshs. 264,710.

13. On the allegations of fraud, it was submitted that the learned trial Magistrate had a duty to consider the particulars raised and that failure to consider the said particulars is a misdirection and error in law. The appellants submitted that whether the particulars of fraud were proved or not is immaterial but that the Learned trial magistrate had a duty to consider them and make a finding and failure to do so was a grave error of principle and Law.

14. It was submitted that the conduct of the respondent before the trial court did not deserve a reward of costs as granted by the court.

Analysis and Determination

15. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own independent conclusion but in doing so, bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

16. Having considered the pleadings, the grounds of appeal and the submissions on record, the issue for determination by this court is whether the trial court erred in dismissing the appellant's suit.

17. The burden of proof lies on the persons who alleges. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

18. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

19. The first prayer sought by the appellants was a declaration that they had finished paying off their loan facility and that further charges were illegal.

20. The appellants submitted that what they had been given by the respondent was an overdraft and that this shifted the burden to the Defendant/respondent herein to prove that they offered a loan not overdraft facilities. However, in their own pleadings in the plaint, the appellants pleaded that in 1994, they applied for a loan and overdraft facility from the defendant's office and that they received a total

of Kshs. 600,000 which amount included Kshs. 400,000 that was deducted to repay the overdraft amount.

21. The 2nd appellant in her own testimony stated that she applied for a loan from the respondent. It was her testimony in cross-examination that as they waited for the loan to be approved, they were granted an overdraft.

22. DW1 who testified on behalf of the respondent before the trial court stated that the appellants applied for a loan of Kenya Shillings One Million out of which Kshs. 600,000 was approved.

23. It is a principle of law that parties are bound by their pleadings. The appellant herein pleaded that they had applied for a loan from the respondent. In all their dealings, the parties referred to the monies advanced as a loan. In their own letter dated 13.8.1993 produced by the respondents, the appellants sought to have the loan amount changed from One million to Six hundred thousand shillings.

24. It is therefore not correct for the appellants on approaching this court on appeal, despite the clear evidence on record to advance the argument that they did not take a loan from the respondent. This Court is not persuaded by the arguments made by the appellants that they took an overdraft and not a loan facility. Neither does this court buy the argument that therefore the burden of proof shifted onto the respondent to prove that it had advanced a loan to the appellants. I find the arguments by the appellants to amount to a mockery of the judicial system as this Court is not blind to the pleadings before it.

25. I reiterate that the evidence on record is clear that the appellants obtained a loan from the respondent and subsequently went into default in servicing the same as was demonstrably from the appellants' own letters seeking more time to settle the loan. If the appellants had finished repaying the loan, why were they asking for more time to settle the same. What reconciliation statement did they produce in court to show that the entire loan advanced to them was fully settled and that what remained were the illegal charges? I find noting on record to support the first prayer by the appellants.

26. To this end, I find and hold that the appellants failed to prove that they did not take a loan or that they had finished paying the loan facility.

27. The appellants also sought a permanent injunction against the respondent restraining the respondent from disposing off the suit property which was given as security for the loan facility.

28. A permanent injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. Courts have the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the *Civil Procedure Code*, 2010 if it feels the right of a Party has been infringed, violated and/or threatened as the Court cannot just sit, wait and watch under these given circumstances.

29. In *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR the High Court on appeal held that:

> "It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

30. The question thus is whether there were any compelling factors that would warrant the granting of a permanent order of injunction to the appellants against the respondent Bank.

31. It is not in dispute that the appellants owed the respondent as is evident from the numerous demand letters by the respondent for the settlement of defaulted loan amount, while the appellants in their own letter dated July 3, 1994 asked for more time to enable them make payments on the loan due. There is no evidence that the appellants disputed the loan due and owing or that the y settled the amounts that were owing as at the time that they were asking for more time, or later. Accordingly, the respondent was within its right to pursue measures to realise their loan. That being the case, the court cannot restrain the bank from realising the securities for the loan advanced.

32. In my humble view, the present case does not fall within the category of clear-cut cases that can form a basis to grant a permanent injunction.

33. On the allegations of fraud, it has been submitted in contention in this appeal by the appellants that the trial magistrate had a duty to consider the same notwithstanding the merits and or whether fraud was proved or not proved as pleaded. In my humble view, this is a flawed understanding of the law. I say so because, there are certain requirements that must be met for the allegation of fraud to be admitted by a court of law.

34. The first principle is that an allegation of fraud must be specifically pleaded and proved. In *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA (as he then was) stated as follows:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently.
>
> It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts."

35. In *R.G Patel v Lalji Makanji* [1957] EA 314 the former Court of Appeal for East Africa stated as follows:

> " Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

36. In *Belmont Finance Corporation Ltd v Williams Furniture Ltd* Buckley L.J said:

> " An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity."

37. The second principle is that the burden of proof of an allegation of fraud is on the person alleging. In *Ndolo v Ndolo* [2008] 1KLR (G &F) 742 the court stated that:

> " We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

38. In *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR the court pronounced itself as follows:

> " It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations....."

39. In the case of *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & Another* [1979] eKLR, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it.

40. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR, the Court of Appeal observed as follows:

> " In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent....."

41. The third principle is that the burden of proof of allegation of fraud is higher than that required in civil cases, that of proof on a balance of probabilities; and lower than that required in criminal case that is beyond reasonable doubt. In *Ndolo v Ndolo* [2008] 1KLR (G &F) 742 the Court stated that:

> " ...Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases....."

42. In *Central Bank of Kenya Limited v Trust bank Limited & 4 Others* [1996] eKLR, the court rendered itself as follows:

> " The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case."

43. In *Moses Parantai & Peris Wanjiku Mukuru supra*, the Court of Appeal observed as follows:

> " ..... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities....."

44. In *R.G Patel supra* the former Court of Appeal for East Africa stated as follows:

> " Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

45. In the instant case, it was upon the appellants to adduce evidence of the allegations of fraud that they had made against the respondent Bank which they did not. The allegations of fraud particularised by the appellants remained unsubstantiated and as a result, I hold that the same was not proved to the required standard. It therefore follows that the failure by the trial magistrate to consider whether or not fraud was proved was inconsequential.

46. Finally, as regards costs, it is trite that costs follow the event and the same is in the discretion of the trial court. The trial court having found that the appellants failed to prove their case, she was well within her powers to grant the respondent costs. I find no compelling reason to upset that discretionary power.

47. The upshot of the foregoing is that I find no reason to interfere with the trial court's judgement. I uphold the same and proceed to dismiss the instant appeal with an order that each party do bear their own costs noting that the respondent did not participate in the appeal.

48. This file is closed.

Dated, Signed and Delivered at Kisumu this 20th Day of May, 2024

R.E. ABURILI

JUDGE