**Letshego Kenya Limited v Dawa & 2 others (Commercial Appeal E072 of 2023) [2024] KEHC 7481 (KLR) (Commercial and Tax) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7481 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**COMMERCIAL APPEAL E072 OF 2023**

**MN MWANGI, J**

**JUNE 14, 2024**

**BETWEEN**

**LETSHEGO KENYA LIMITED ............................................................ APPELLANT**

**AND**

**SIKO WORME DAWA ................................................................... 1ST RESPONDENT**

**BASHIR MOHAMMED HALIK ................................................ 2ND RESPONDENT**

**BITE SHOTE KORE ...................................................................... 3RD RESPONDENT**

***(Being an Appeal from the judgment of the Hon. B. Kasavuli, Chief Magistrate, delivered on 16th March, 2023 in the Chief Magistrate's Court at Milimani Nairobi Civil Suit No. E4557 of 2020)***

## JUDGMENT

1. The plaintiff (appellant) filed a suit against the defendants (respondents) vide a plaint dated 24th August, 2020 praying for judgment against the respondents for the sum of Kshs.1,125,123.99 being the outstanding loan due to the appellant from the respondents as at 13th December, 2019, with interest at 24% per annum and costs of the suit. The appellant's case was that the 1st respondent is the holder of loan account No. 11000084412 with the appellant. That vide a letter of offer dated 18th July, 2016, the appellant advanced to the 1st respondent a financial facility of Kshs.1,100,000.00 to be repaid by the 1st respondent making twenty-four (24) equal monthly instalments of Kshs. 67,900/= from the date of drawdown. It was a term of the letter of offer that the said facility would attract interest at the rate of 24% per annum.

2. The loan was secured by motor vehicle Leyland Hawk Registration No. KBR 193B whose logbook was registered in the joint names of the appellant and the 1st respondent. The said loan was also guaranteed by the 2nd & 3rd respondents. It was stated by the appellant that the 1st respondent fell into arrears in

the year 2017, thus he opted to surrender motor vehicle Leyland Hawk Registration No. KBR 193B to the appellant, but the appellant was for a long time not able to sell the said motor vehicle, thus the motor vehicle storage charges accrued to Kshs.350,000/= for the period between 24th April, 2017 to 13th September, 2019 and Auctioneer's fees of Kshs.35,800/= was incurred.

3. The appellant contended that the said motor vehicle was eventually sold for Kshs. 600,000/= and the said funds were used to settle the Auctioneer's & storage fees, and part of the outstanding loan amount. The appellant stated that after the 1st respondent surrendered motor vehicle Leyland Hawk Registration No. KBR 193B, it neglected and/or stopped making the required monthly payments as and when they fell due, hence as at 17th June, 2020, the 1st respondent had an outstanding loan balance of Kshs.1,125,123.99 which amount continues to accrue interest and other charges.

4. In opposition to the appellant's suit, the respondents filed an amended statement of defence where they denied all the averments contained in the appellant's plaint. The 1st respondent averred that there was change in circumstances in August 2017 that led him to surrender the suit motor vehicle so as to avoid breaching the contract between him and the appellant. He further averred that the appellant had every right to sell the said motor vehicle upon surrender, to recover the balance of the loan facility and release the balance of the realized amount to him. The 1st respondent stated that although the 2nd & 3rd respondents guaranteed the loan advanced to the 1st respondent, the said loan was sufficiently secured by the suit motor vehicle whose log book was registered as a Chattels Mortgage, which means that the only remedy that was available to the appellant was to resell the suit motor vehicle and use the sale proceeds to offset the loan arrears.

5. The 1st respondent contended that before he surrendered the suit motor vehicle to the appellant, he had paid the appellant a total of Kshs.685,000.00 towards repayment of the loan, and the vehicle was in good shape thus attracting a forced sale value of Kshs.880,000.00. He stated that the storage charges were overly exaggerated and in any event, they should be taken care of by the appellant who had a right under the Chattel Mortgage to repossess the suit motor vehicle. The 1st respondent further stated that the suit motor vehicle was sold at an undervalue since as at 2018, its forced sale value was Kshs. 850,000/=.

6. In a judgment delivered on 16th March, 2023, the Trial Court dismissed the appellant's claim in its entirety on grounds that the appellant failed to discharge its burden of proof. Aggrieved by the aforesaid judgment, the appellant filed a Memorandum of Appeal dated 15th April, 2023 raising the following grounds of appeal -

    i. That the learned Trial Magistrate erred in law and fact in dismissing the plaintiff/appellant's suit in its entirety and against the weight of the evidence adduced at the trial;

    ii. That the learned Trial Magistrate erred in law and in fact by failing to consider (sic);

    iii. That the learned Trial Magistrate erred in law and fact in failing to appreciate and or invoke the evidence presented and/or applying the same; and

    iv. That the learned Trial Magistrate erred in fact and law in failing to reach a finding that the defendant owed the plaintiff loan monies even though there was evidence of the same.

7. The appellant's prayer is for the instant appeal to be allowed with costs, for the Trial Magistrate's judgment dated 16th March, 2023 to be set aside and be substituted with a decision of this Court granting the appellant the orders sought in its plaint dated 24th August, 2020.

8. The instant appeal was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of Mulondo & Company Advocates LLP on 9th April, 2024, whereas the respondents' submissions were filed by the law firm of Mutonyi Mulama & Company Advocates.

9. Ms. Njiru, learned Counsel for the appellant submitted that there is no dispute that the 1st respondent's loan was in arrears at the time it surrendered the suit motor vehicle to the appellant for sale. That the loan statement produced by the appellant confirmed that as at August 2017, the 1st respondent had an outstanding loan balance of Kshs. 860,642.62. She further submitted that it was a term of the letter of offer that the loan would attract interest until it was repaid in full, thus the 1st respondent's claim that it only had a loan balance of Kshs.415,000.00 having repaid Kshs.685,000.00 by the time he surrendered the suit motor vehicle is false.

10. Ms. Njiru relied on the Court of Appeal case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, and contended that by voluntarily executing the letter of offer dated 18th July, 2016, the 1st respondent confirmed that he understood the terms and agreed to be bound by them. She stated that the 1st respondent was fully aware that he still had an obligation to keep making monthly instalments towards repayment of the loan despite the fact that it surrendered the suit motor vehicle to the appellant. She contended that the suit motor vehicle was eventually sold for Kshs.600,000.00 which was its forced sale value as per the valuation conducted on it in the year 2019, which amount was not sufficient to settle the loan arrears which had accrued interest by that time.

11. Counsel asserted that since the 1st respondent admitted to being in arrears when he surrendered the suit motor vehicle to the appellant, the learned Magistrate having found that the amount realized from the sale of the said vehicle was less than the value of the vehicle when it was surrendered to the appellant, ought to have made a finding that the 1st respondent was still indebted to the appellant. Miss Njiru cited the provisions of Section 176 of the *Evidence Act* and argued that entries in a bankers' book shall be received in proceedings as prima facie evidence of such entry. She referred to the case of *Ecobank Kenya Limited v Liberty Graphics Kenya Limited & 3 others* [2021] eKLR, and stated that the bank statement produced by the appellant shows that as at 4th December, 2019 the loan balance was Kshs.739,323.99. She urged this Court to enter judgment on the amount of Kshs.739,323.99 that was proved.

12. Mr. Mutonyi, learned Counsel for the respondent submitted that the respondents are not indebted to the appellant since the proceeds of the sale of the suit motor vehicle were enough to settle the outstanding balance as at the time of surrendering the vehicle plus interest, because at the time of surrendering the vehicle, the 1st respondent had paid the appellant a total of Kshs.685,000/=, leaving a balance of Kshs.415,000/=, whereas the suit motor vehicle was valued at Kshs.880,000/= by Regent Automobile Valuers & Assessors Limited on 2nd November, 2018. Counsel contended that the 1st respondent should not be blamed and charged for the appellant's delay in selling the suit motor vehicle. He stated that the appellant has not demonstrated that it had difficulties in selling the said vehicle, and it should have produced adverts for sale of the said vehicle.

13. Counsel relied on the case of *National Industrial Credit Bank Limited v Samuel Orindo Manai Omokaya* [2017] eKLR and stated that the Trial Magistrate did not err in his finding that the appellant had not proved that the respondents owed it any money. He further stated that pursuant to the letter of offer dated 18th July, 2016, the loan advanced to the 1st respondent by the appellant was secured by a chattel mortgage over the suit motor vehicle, and a chattel mortgage for household goods in favour of the appellant. He contended that the appellant did not demonstrate before the Trial Court whether the said chattels were registered, thus it is clear that the chattel over the suit motor vehicle is an unregistered chattel mortgage.

14. Mr. Mutonyi relied on the provisions of Section 120 of the *Evidence Act*, the case of *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR and the Court of Appeal case of *First Assurance Company Limited v Seascapes Limited* [2008] eKLR, and argued that since the appellant accepted the suit motor vehicle as the only security for the financial facility advanced to the 1st respondent, it is estopped from denying that the said motor vehicle was the only security for the said loan.

15. Counsel asserted that the appellant ought to have served the 1st respondent with notices of the intended sale of the suit motor vehicle but it did not. Furthermore, the 1st defendant was never served with a proclamation notice, a redemption notice, and a notification of advertisement for sale of the suit motor vehicle prior to its sale, thus the said sale was invalid.

**Analysis And Determination.**

16. This being a first appeal, it is by way of re-trial and as the first appellate Court, this Court has a duty to re-evaluate, re-analyze and re-consider the evidence adduced before the Trial Court and draw its own conclusions, while bearing in mind that it did not see and hear the witnesses testifying and give due allowance to that fact.That was the position held by the Court in the case of *Peters v Sunday Post Limited* [1985] EA 424 where it was held 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..."

17. An appellate Court will only interfere with the Trial Court's finding if the same is founded on wrong principles or if the Trial Magistrate misdirected himself. To this end, I am abound by the Court of Appeal finding in the case of *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931 where it was held as follows -

> " Accordingly, on when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere".

18. I have re-examined the entire record and given due consideration to the written submissions by Counsel for the parties. The issue that arises for determination is whether the appellant discharged its burden of proof before the Trial Court.

19. It is not disputed that the appellant advanced a financial facility of Kshs. 1,100,000/= vide a letter of offer dated 18th July, 2016, which amount was to be repaid by the 1st defendant making twenty-four (24) equal monthly instalments of Kshs. 67,900.00. On perusal of the letter of offer dated 18th July, 2016, it is evident that the loan would attract interest at the rate of 24% per annum. The loan was secured by a Chattels Mortgage in favour of the appellant over motor vehicle Leyland Hawk Registration No. KBR 193B whose logbook was registered in the joint names of the appellant and the 1st respondent, household goods, deposits/savings of the borrower/guarantor held with the appellant, and any other security as the appellant would require to secure the 1st respondent's obligation from time to time.

20. The said letter of offer also provided that the securities would be continuing securities for the payment of the loan notwithstanding any intermediate payments or settlement of accounts. The appellant also produced the 1st respondent's loan application form dated 30th May, 2016 where it listed the 2nd & 3rd respondents as its proposed guarantors. Guarantee and undertaking agreements were executed by

the 2nd & 3rd respondents. It is clear from the evidence adduced and the pleadings that sometime in the year 2017, the 1st respondent fell into arrears and opted to surrender motor vehicle Leyland Hawk Registration No. KBR 193B to the appellant. The 1st respondent produced a letter dated 22nd January, 2018 indicating that he was unable to continue repaying his loan by way of monthly instalments, and he requested the appellant to repossess the security and sell it in order to recover the remaining balance plus interest since the value of the lorry would be sufficient to repay his loan in full.

21. Further, PW1 in cross-examination confirmed receipt of the said letter, but stated that the appellant did not respond to it. She testified that the appellant received the suit motor vehicle from the 1st respondent on 24th April, 2017. PW1 confirmed that in the year 2018, the forced sale for the vehicle was was Kshs.800,000/=. On perusal of the Valuation Report from Regent Valuers who conducted a valuation on the suit motor vehicle in the year 2018, it is manifest that the vehicle's forced sale value was Kshs.880,000/= and the market value was Kshs.1,170,000/=. It was the evidence of PW1 that after the vehicle was received from the appellant in the year 2017, they had challenges in selling it because of its make, thus it stayed in the storage yard for an extended period of time.

22. In examination-in-chief, PW1 stated that the appellant attempted to sell the suit motor vehicle four (4) times in the year 2018 when it was valued at Kshs.800,000/= but it was not successful. I however note that no evidence was tendered by the appellant in support of the said allegation. It is trite law that he who alleges must prove. This maxim is founded on the provisions of Sections 107, 108 & 109 of the *Evidence Act*. If at all the appellant wanted the Trial Court and this Court to believe that it attempted to sell the suit motor vehicle four (4) times in the year 2018 but was unsuccessful, it should have submitted proof to that effect. Since no evidence was tendered in support of the said allegation, this Court is not persuaded that the appellant attempted to sell the suit motor vehicle in the year 2018 at all.

23. The appellant asserted that when the 1st respondent surrendered the suit motor vehicle to the appellant sometime in the year 2017, it stopped making its routine monthly instalments towards offsetting the loan balance, thus as at 13th December, 2019, the outstanding loan amount stood at Kshs. 1,125,123.99. Further, since it took a while before the suit motor vehicle was sold, there was an accumulation of storage charges amounting to Kshs. 350,000/= and subsequent Auctioneer's fees of Kshs.35,800/=. The appellant's evidence was that once the suit motor vehicle was sold sometime in the year 2019 for Kshs,600,000/=, proceeds of the said sale were first used to settle the Auctioneer's charges and storage charges in full, and the balance thereof was applied towards the loan balance, but the said balance was not sufficient to fully offset the outstanding loan balance.

24. As stated herein above, the 1st respondent vide a letter dated 22nd January, 2018 informed the appellant that he was unable to continue repaying his loan by way of monthly instalments and requested the appellant to repossess the suit motor vehicle and thereafter sell it in order to recover the remaining balance of his loan plus interest since the value of the lorry would be sufficient to repay his loan in full. The appellant's witness confirmed that the appellant received the said letter but did not respond to it. She further confirmed that the appellant received the suit motor vehicle from the 1st respondent on 24th April, 2017. Subsequently, Regent Auctioneers acting on the appellant's instructions valued the suit motor vehicle on 29th October, 2018 and prepared a report dated 2nd November 2018 indicating that the market value of the suit motor vehicle was Kshs.1,170,000/=, and its forced sale value was Kshs.880,000/=.

25. This Court has had the opportunity of perusing the 1st respondent's statement of accounts produced by the appellant and I note that in the loan statement of up to 7th October, 2019, it is evident that as at 24th April, 2017, the loan balance stood at Kshs.860,642.62, but as of 24th December, 2017, the said loan balance stood at Kshs.782,448.25. That is evidence that the 1st respondent did not stop making

his monthly instalments towards offsetting the loan balance since the loan balance between the time he surrendered the suit motor vehicle and 24th December, 2017 had reduced. Further, if the suit motor vehicle had been sold between April 2017 and January 2018, proceeds realized therefrom would have been sufficient to settle the 1st respondent's loan balance plus the accrued interest in full.

26. As stated above herein and confirmed by the appellant's witness, the appellant received the 1st respondent's letter dated 22nd January, 2018 stating that he was unable to continue repaying his loan by way of monthly instalments thus the appellant should repossess the suit motor vehicle, sell it and use the proceeds from the said sale to recover the remaining balance of his loan plus interest but failed to respond to it, and received the suit motor vehicle from the 1st respondent. These actions by the appellant can only mean that the appellant was agreeable to the terms of the 1st respondent's letter dated 22nd January, 2018. Further, it has been confirmed that the forced sale value of the suit motor vehicle as at November, 2018 was Kshs. 880,000/= , whereas its market value was Kshs.1,170,000/=. This means that if the appellant had sold the suit motor vehicle between 24th April, 2017 and January, 2018, proceeds of the said sale would have been sufficient to fully settle the 1st respondent's loan balance with the appellant.

27. In light of the foregoing, the appellant is estopped from claiming that the 1st respondent was expected to continue making monthly instalments towards offsetting the outstanding loan balance. The doctrine of equitable estoppel prevents a party from acting inconsistently with a promise the party has made if that promise or representation had the effect of inducing another party to reasonably rely on it to that other party's detriment. The Court of Appeal in the case of *Serah Njeri Mwobi v John Kimani Njoroge* [*supra*] eKLR held that -

> " The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person."

28. This Court is of the considered view that from the evidence adduced, as at time the appellant agreed to receive the suit motor vehicle from the 1st respondent, it was persuaded that proceeds from its sale would be sufficient to settle the 1st respondent's loan account. The appellant did not however sell the said motor vehicle until sometime in the year 2019 and contends that the suit motor vehicle was sold for Kshs.600,000.00. As explained here before, the appellant has neither demonstrated that it attempted to sell the suit motor vehicle at all in the year 2018, nor has it demonstrated that the suit motor vehicle was sold in the year 2019 for Kshs.600,000.00. For this reason, the appellant cannot be blamed for the appellant's failure to sell the motor vehicle at the time it was surrendered. The appellant had a duty to demonstrate its attempts if any, to sell the suit motor vehicle, and if at all it was sold, at how much it was sold and how the proceeds of the sale were applied.

29. The standard of proof in civil cases as is the case herein, is that of on a balance of probabilities. In the case of *Miller v Minister of Pensions* [1947] 2ALL. ER 372 the Court of Appeal stated that -

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not. Thus, proof on a balance or prepondence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

30. Having applied the law to the facts, I agree with the Trial Magistrate that the appellant did not discharge its burden of proof to the required standard to establish that the appellant was and is still indebted to it. Having found so, whether or not there was a valid guarantor agreement between the 2nd & 3rd respondents and the appellant is non-consequential since it has not been proved that the 1st respondent was and is still indebted to the appellant.

31. In the premise, I find that the appeal herein is devoid of merits. It is hereby dismissed with costs to the respondents.

It is so ordered.

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

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Mutonyi for the respondents

No appearance for the appellant

Mr. Luyai - Court Assistant.

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