



REPUBLIC OF KENYA



KENYA LAW
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**Mutunga v Equity Bank (Kenya) Limited (Civil Appeal 501 of 2018)
[2024] KEHC 8528 (KLR) (Civ) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 501 OF 2018

DKN MAGARE, J

JULY 8, 2024

BETWEEN

BENJAMIN WAEMA MUTUNGA APPELLANT

AND

EQUITY BANK (KENYA) LIMITED RESPONDENT

*(Being an appeal from the Ruling of Hon. A.M. Obura (SPM) in
Nairobi CMCC No. 6829 of 2018, delivered on 2nd July, 2018)*

JUDGMENT

1. This appeal arises from the Ruling and Order of Hon. A.M. Obura, Senior Principal Magistrate delivered on 2/7/2018 in Milimani CMCC No. 6829 of 2018.
2. The ruling arose from the Application dated 26/2/2018 seeking summary judgment. In the said application, the Appellant was said to have obtained a loan from the Respondent on 12/9/2013 for Kshs. 18,990,000/-. The Appellant had subsequently fallen into arrears and the loan amount of Kshs. 14,712,415.95 was outstanding as pleaded in the Complaint dated 20/9/2017.
3. The appellant filed his defence dated 1/11/2017. The Respondent then filed an Application dated 26/2/2018 seeking summary Judgment against the Appellant on the ground that the defence raised no triable issue.
4. In his response to the application for summary judgment, the Appellant contended that the loan amount was taken for the benefit and on behalf of the third parties. Therefore, that the Applicant ought to have demanded payment from the said third parties.
5. The trial court considered the application and response thereto and rendered its Ruling on 2/7/2018 allowing summary judgement for the Respondent as against the Appellant.



6. The Appellant, aggrieved, obtained leave to lodge appeal out of time and lodged a Memorandum of Appeal raising grounds that the learned magistrate erred in law and fact in:
 - a. Finding no *bona fide* triable issue in the defence.
 - b. Allowing the application for summary judgement.
 - c. Failing to recognize the appellant's right to be heard.
 - d. Failing to appreciate that the third party, John Ndunda had admitted that he was the beneficiary of the loan facility amounting to Kshs. 9,495,000/-
 - e. Failing to take into account the collateral contracts.

Submissions

7. The Appellant filed submissions dated 29/1/2024. The Appellant's position was submitted that the defence raised triable issues.
8. It was also submitted that the third parties should indemnify the Appellant and reliance placed on *Postal Corporation of Kenya v Inamdar & 2 Others* (2004) eKLR. Unfortunately, this submission attempts to go into the merits of the lower court case that is now determined. It does not advance whether summary judgement was proper and I will disregard it to that extent.
9. In addition to *Postal Corporation* (*supra*), the Appellant also relied on *Industrial and Commercial Development Commercial Development v Dabier Enterprises* (2000) EA 75 and submitted that there must be plain and obvious to warrant summary judgement.
10. The Respondent on the other hand filed submissions dated 5/3/2014. It was submitted that the case before the lower court for summary judgement was clear and there was no triable issue. They relied on *Crown Health care v Jamu Imaging Limited* (2021) eKLR. It was also submitted that the trial court properly exercised its duty under Order 36 of the *Civil Procedure Rules* since the amount claimed was liquidated and the defence was but a sham.

Analysis

11. 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.
12. This was aptly stated in the case of *Peters v Sunday Post Limited* [1958] EA 424 where, the court of Appeal 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. In *Selle & Another v. 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..."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.

14. In the case of *Mbogo and Another v. 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."

15. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus Classicus* case of *Selle and another v Associated Motor Board Company and Others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

".. 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

16. This case was however determined on affidavit evidence. As such the court has a wide latitude. In the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

"I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the *Court of Appeal Rules 2010*; *Selle v Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

17. The issue for determination is whether the lower court erred in allowing the Respondent's application for summary judgement. The rationale for summary judgement was stipulated in the case of



International Fund for *Agricultural Development – v- Ahmad Jacayeri* (2001) 1 All ER 161 where the Court held that: -

“While recognizing that a fuller picture may emerge at that stage, the Court can only determine an application for Summary Judgment on the material before it. The defendant cannot ask the Court to allow the matter to go to trial simply on the grounds that something unexpected might turn up to assist him.”

18. The Application was based on whether the defence raised any triable issue. Before concluding on whether a defence raises a triable issue for the purpose of striking it out or marking it as a sham devoid of any defence, the court has to exercise exceptional caution. The Court of Appeal in case of *DT Dobie & Company (Kenya) Ltd v. Muchina* (1982) KLR, laid the principles applicable in considering whether or not to strike out pleadings as follows:-

“The Court should not strike out suit if there is a cause of action with some chance of success:

The power to strike out suit should only be used in plain and obvious cases and with extreme caution;

The power should only be used in cases which are clear and beyond all doubt;

Court should not engage in a minute and protracted examination of documents and facts; and

If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.”

19. The parties made attempts to submit on the merit of the loan agreement and the collateral contract. These are not matters before this court. Such matters would lie for determination if the suit were to continue for determination on merits.
20. This court is only concerned with the summary judgement and whether the law and principles supported the learned magistrate’s conclusion that the Respondent was entitled to summary judgement.
21. I note that the application also sought an alternative prayer of judgment on admission. The learned magistrate noted that under paragraph 3 of the defence the Appellant expressly admitted that he obtained the loan. As was held in *Lagoon Development Limited v Prime Aluminium Casements Limited* [2021] eKLR:

... in *Rikers DC – v- Bank of England* (2001)2 ALL ER 513

”Lord Hope concerning need inter alia that the rule on Summary Judgment is a recognized exceptions to the traditional method by which issues of fact are tried in our Courts”

“For example, it may be clear as a matter of law at the onset that even if a party were to succeed in proving all the facts, that he offers, to prove, he will not be entitled to the remedy that he seeks. In that event a trial of the facts used be a waste of time and money, and it is proper that the action should be taken out of Court as soon as it is possible. In other cases it may be possible to say wider confidence before trial that the factual basis for the action is fanciful because it is entirely without substance.”

This fundamental logic could not be more different to that advanced as general principles of jurisprudence. In the interpretation and construction of Order 36 of *Civil Procedure Rules*,



on Summary Judgment. In addition to the provisions of Order 36 of the Civil Procedure Rules, the Respondent's application presumably was also determined in consonant under the scope of order 13 Rule (1) (2) of the aforesaid Rules. This rule provides: -

“That where admission of facts have been made in the pleadings or otherwise, whether oral or in writing, the court may at any stage of the suit either on application or of its own motion and without waiting for a full trial give such Judgment with regard to admissions.”

22. However, I note that the Appellant was clear in its Defence that though there was breach, it was a consequence of third parties. Indeed, the Appellant had issued third party notice dated 1/11/2017 and the Third Party, John Ndunda had been enjoined as a third party and had filed a statement of defence dated 3/4/2018 on the same date.

23. Therefore, clearly, the Appellant's defence was not of the nature to be taken as a mere denial, an admission or lacking a triable issue. The Appellant had merely sought to avoid liability in case a judgment be entered against him, so that it is the third party who would be called to liability for the Judgement. However, such conclusion would be arrived at after the hearing of the suit on merits.

24. The Appellant therefore had invoked the provisions of Order 1 Rule 15 of the Civil Procedure Rules as follows:

“(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them.”

25. Therefore, it is my view that the lower court erred in shutting out the Appellant from advancing his case against the third party. Had the court adverted its mind on the existence of third-party proceedings, it would have seen the value of hearing the case of the Appellant as against the third party. Refusing the Appellant chance to advance his case meant that the Appellant would only seek indemnity from the third party through a fresh cause of action. This was not necessary in the circumstances of this case.

26. I also find that the court was wrong in its conclusion that the Respondent had proved the conditions for summary judgement. Summary judgement, the way I understand are proceedings applicable not only to liquidated claims but also where a defence has not been filed despite entering appearance. In this case, the Appellant had filed a defence and had caused third party proceedings against a third party who had filed his defence as well.

27. The provisions of Order 36 Rule 1 of the Civil Procedure Rules based on which the court allowed the application and granted summary judgment for the Respondent are set out as follows:

“



“(1) In all suits where a plaintiff seeks judgment for—

- (a) a liquidated demand with or without interest; or
- (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

- 28. The defence was that a third party is fully liable. That third party was brought to the suit. By entering summary judgment, the Appellant was driven out of the seat of justice.
- 29. The defence need not succeed but at least the same was tenable. If the third party is excluded this early, then the Appellant will unduly be prejudiced.
- 30. In the circumstances, the Appeal is merited.

Determination

- 31. In the upshot, I make the following orders: -
 - a. The Ruling of court dated 2/7/2018 in Milimani CMCC No. 6829 of 2018 be and is hereby set aside.
 - b. The suit be listed for directions on hearing and determination on merits.
 - c. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF JULY, 2024.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform.

In the presence of: -

Miss. Kubai for the Appellant

Miss. Wayari for the Respondent

Court Assistant – Jedidah

