Wanyama v Mwaura & 2 others (Civil Appeal 078 of 2019)
[2024] KEHC 10089 (KLR) (9 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10089 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 078 OF 2019

RN NYAKUNDI, J

AUGUST 9, 2024

BETWEEN

BONIFACE OLWOCHI WANYAMA ..... PLAINTIFF

AND

JONAH KARIUKI MWAURA ..... 1ST DEFENDANT

EQUITY BANK (KENYA) LIMITED ..... 2ND DEFENDANT

DIMONDE AGENCIES & AUCTIONEERS ..... 3RD DEFENDANT

JUDGMENT

Representation:

D.L Were & Company Advocates

Mukabane & Kagunza Co. Advocates

1. The appellant instituted a suit at the magistracy seeking the following orders:

    a. An order barring the defendants, their agents or servants from attaching motor vehicle registration No KBH XXXV which belongs to the Plaintiff and an order that if the defendants have attached the above-mentioned vehicle registration No KBH XXXV, they do return the same unconditionally.

    b. An order that the transfer of Motor Vehicle Registration No KBH XXXV in the names of the 2nd defendant was illegal and unlawful and the same be transferred back to the Plaintiff.

    c. Costs of this suit plus any other remedy this court may deem fit to grant.

2. Both parties made their case at the trial court and the court declared itself in the following terms:

> "Considering the evidence offered by the Plaintiff, I find that he has not satisfied the conditions for grant of injunction. Having found that the Plaintiff has not satisfied the conditions for grant of an injunction it then follows that the orders that the Plaintiff is praying for are undeserving. Consequently, I hereby dismiss the Plaintiff's suit with costs to the 2nd and 3rd defendants."

3. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (4) grounds: -

   a. That the honourable trial magistrate erred in law, and on fact, by failing to appreciate the fact that, the entire process used by the 2nd Respondent herein, equity bank, to have the appellant's vehicle registered in their names was flawed, and illegal, and should have rendered the entire process null and void ab initio.

   b. That the learned trial magistrate erred in law, and on fact, on relying on a letter of authority written by the appellant dated 10th June, 2015, yet that letter was not conclusive since the appellant was also expected to sign on necessary transfer documents.

   c. That the learned trial magistrate erred in law, and on fact, by not appreciating the fact that, the 2nd defendant did not make any efforts to pursue the principal debtor, the 1st respondent herein who was and still has properties and the means to repay the loan.

   d. That the learned trial magistrate erred in law, and on fact, by failing to note that, the document used as a chattel mortgage was not registered as required and the appellant signature was not signed on it.

4. The appeal was canvassed vide written submissions. The 2nd and 3rd Respondents filed their submissions on 6/03/2023 whereas the Appellant filed his submissions dated 20th March, 2023 and filed on 29th March, 2023.

The Appellant's Submissions

5. The appellant started by reminding this court of its duty as the 1st appellate court to re-evaluate the evidence adduced before the lower court with a view of coming to its own conclusion. He cited the case of *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123.

6. It was submitted for the appellant that when he testified at the lower court as PW-1 on 20.11.2018, he told the lower court that he was a surveyor and that he knows the 1st respondent and that the 1st Respondent used his logbook for motor vehicle Registration No KBH XXXV to secure a loan. That he did not execute any transfer application forms and/or a guarantee documents, that he was surprised after auctioneers came looking for motor vehicle registration No KBH XXXV. It was the appellant's evidence that he had the logbook in court which was produced in court as PEXH

7. He stated that he had a copy to show that the motor vehicle was transferred into joint ownership of himself and the 2nd Respondent which was transferred into joint ownership of himself and the 2nd Respondent which transfer the appellant did not approve and was never given in the first instance.

8. Further, he stated that he had a letter from equity bank dated 16.02.2017 which was produced as PEXH-2 and logbook in the name of the appellant and the 2nd respondent was produced as PEXH-3, instructions from the 3rd Respondent produced as PEXH-4 and stated that he was never served with

any statutory notice and he did not write any letter of authorization authorizing the 1st Respondent to offer the logbook as security for his loan. He prayed for judgment as in the Plaint.

9. The appellant identified four issues for determination as follows:

   i. Whether the 2nd Respondent could attach and sell the appellant's motor vehicle where no chattel instrument had been executed, attested and registered in accordance with section 6 and 13 of the *Chattels Transfer Act* Cap Laws of Kenya

   ii. Whether there was any contractual obligation on the part of the appellant to indemnify the 2nd respondent for the 1st Respondent default absence of execution of any guarantee and indemnity.

   iii. Whether or not the appellants ought to have been notified of the principal borrower's default before attachment.

   iv. Whether the appeal is merited.

10. On the 1st issue, it was submitted for the appellant that the learned trial magistrate erred in fact and in law in failing to properly or at all, analyse, evaluate and consider, the totality of evidence, adduced by the appellant and consequently, the trial court arrived at a conclusion contrary to the evidence on record and in particular, the learned magistrate erred in law and fact by failing to note that the document used as chattel mortgage was not executed, attested and registered as required by the law. That the 2nd Respondent did not produce any registered chattel instrument to show the honourable court that the appellant actually gave his motor vehicle as security either in the nature of a chattel mortgage, letter hypothecation or otherwise.

11. The appellant further argued that the purported letter by the appellant dated 10th June, 2015 giving authority to the 1st respondent to use the log book for the subject motor vehicle is not sufficient to create an instrument securing the payment of money or the performance of any obligation and he urged the court to find so. The appellant stated that the letter was not conclusive in the sense that he was also expected to sign on necessary transfer documents which submission the honourable court did not make a finding thereby erring in law and fact.

12. It was submitted for the appellant that the trial court erred in failing to analyse the application of section 6 and 13 of the *Chattels Transfer Act* laws of Kenya. He stated that section 6 of the repealed *Chattels Transfer Act* Cap 28 which was applicable at the time when this suit was filed and time of judgment being entered states: -

> " 6(1) The period within which an instrument may be registered is twenty-one days from the day on which it was executed."
>
> Provided that when the time for registering an instrument expires on a day whereon the Registrar's office is closed, the registration shall be valid if made on the next following day on which the office is open.

13. Learned counsel further made reference to section 13 of the same act which provides: "(a) Every instrument unless registered in the manner provided under this part, shall upon the expiration of the time for registration or if the time for registration is extended by the high court upon the expiration of the extended time be deemed fraudulent and void as against: (b) The assignee or trustee acting under any assignment for the benefit of the creditors of that person."

14. According to the appellant, at the trial court he testified that he never executed any chattel mortgage. DW-1 admitted during cross-examination that the he did not execute the purported chattel mortgage, DW-1 also admitted that the purported chattel mortgage was not registered as required by section 6 and 13 of Cap 28. That the 2nd Respondent had the onus to prove that chattel mortgage was executed, attested and registered within the time limit spelt out in Cap 28 Laws of Kenya.

15. The appellant made a case that the trial magistrate misdirected himself in law when he made a finding that at page 95 of the record of appeal that "the Plaintiff conduct can be deduced as a person who had given the 1st defendant authority to use his motor vehicle as collateral to seek loan" but he missed the point when he failed to analyse that the logbook was given to the 1st Respondent for safe custody as per the appellant's statement found at page 9 of the record of appeal which statement was adopted as evidence of the appellant. He further stated that the trial court also failed to analyse whether the chattel mortgage relied upon by the 2nd Respondent complied with the laws despite the issues having been raised in the pleadings, evidence and the submission of the appellant thereby disregarded the provisions of section 6 and 13 of Cap 28 laws of Kenya and he urged this court to find so.

16. He concluded in submitting that execution, attestation and registration of chattel mortgage is a mandatory requirement and the same went to the root defence case and failure to comply by the 2nd Respondent, rendered the entire process to recover the loan advanced to the 1st respondent null and void and urged this court to find so.

17. As to whether there was any contractual obligation on the part of the appellant to indemnify the 2nd respondent, the appellant submitted that the trial court erred in law and in fact in failing to evaluate whether there was any contractual obligation on the part of the appellant to indemnify the 2nd respondent for the 1st respondent default in absence of execution of any guarantee and indemnity. Similarly, there was no deed of guarantee entered into by the appellant with the 1st and 2ns respondents undertaking to secure the payment of the purported credit facility extended to the 1st Respondent. As such there was no contractual obligation created on the appellant that would entitle the 2nd respondent to attach and sell the appellant's motor vehicle as they purported to do.

18. The appellant maintained that he never signed any transfer documents permitting his vehicle to be transferred in favour of the 2nd Respondent. Any transfer effected is thus illegal and the 1st and 2nd Respondent must have used fraudulent documents to have the appellant's motor vehicle transferred.

19. It was submitted for the appellant that he was not aware that his motor vehicle had been pledged as security until when the 3rd Respondent came to attach the said motor vehicle. The appellant further submits that, he did not give any authority for his motor vehicle registration No KBH XXXV to be used as security for the 1st Respondent's loan facility with the 2nd Respondent. It is the contention of the appellant that the proper procedure was not followed in pledging the subject motor vehicle thus there was no guarantee undertaking or obligation created between the appellant and 1st Respondent to entitle the 2nd Respondent to attach the appellant's motor vehicle.

20. The appellant argued that he did not sign on any document to show that he had agreed to be a guarantor. It is mandatory that the official bank document be signed by the guarantor in presence of an advocate. The appellant stated that the 2nd Respondent witness conceded that there was no instrument of guarantee in which the appellant was bound to pay the moneys owed by the 1st Respondent.

21. The appellant further argued that if at all there was an instrument to guarantee then we could say that there was a contract between the appellant and 2nd respondent which bound the appellant to charge his motor vehicle as security for the loan advanced to the 1st Respondent. There is no such instrument

of guarantee and therefore there is not contract between the appellant and the 2nd respondent and thus no terms between the two parties that would permit the 2nd respondent to attach the subject motor vehicle or have it jointly registered.

22. Finally, the appellant submitted that the 2nd Respondent did not make any efforts to pursue the principal debtor, the 1st Respondent herein who was and still has properties and means to repay the loan. That notice to the guarantor from the secured credit informing the guarantor about the default of the principal debtor was mandatory. To this end, he submitted that DW1 admitted that there was no notice or demand issued to the appellant informing him of the 1st Respondent default in servicing the loan and requiring him to avert the same.

23. The Appellant cited the decision in Civil Appeal No 117 of 2014; *Benjamin Odiara Ahinda v Kenya Women Finance*. He equally relied on section 66 of the *Movable Property Security Rights Act*, 2017.

24. The appellant in concluding urged the court to find that the instant appeal is merited and should be allowed as prayed.

The Respondents' Submissions

25. The Respondents made submissions to the effect that even before the loan was secured, the Plaintiff/ appellant had written to the bank authorizing them to use his log book and motor vehicle as security. That it is not true that the Plaintiff was not aware of the use of the suit motor vehicle as security.

26. The 2nd and 3rd Respondents argued that during cross examination, their witnesses maintained that the appellant had authorized the bank to use his log book as security.

27. Learned counsel maintained that in dismissing the appellant's suit the trial court was properly guided and therefore the trial magistrate's decision should not be disturbed and this appeal should thus be dismissed with costs.

Analysis & Determination

28. Being a first appeal, the court is called upon to look into the evidence and factual information presented at the trial court, evaluate the same and make a determination, conscious of the fact that the trial court had the advantage of observing the demeanour of the witnesses. The Court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

> "...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 into account of particular circumstances or probabilities materially to estimate the evidence."

29. Having read through the record, the main issue I find for determination is whether the orders sought by the appellant are merited.

30. The *Law of Guarantees* by Geraldine Andrews & Richard Millet 2nd Edition, at page 156 states as follows: -

> "A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to

indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point."

31. At the trial court, the Appellant pleaded fraud and stated that he never signed any transfer forms and therefore the 2nd Respondent forged the Plaintiff's signature which is criminal in nature. Upon cross examination, the appellant this time testified that he gave the 1st Respondent the logbook of his motor vehicle to show the manager of the bank. He also confirmed that he gave the 1st Respondent an authority letter. That he wanted to see the forms and conditions of the loan to enable him make up his mind.

32. Earlier on, the Appellant in his witness statement dated 16th March, 2017 he stated that sometimes in the year 2016, he gave the 1st Respondent his original log book of vehicle registration No KBH XXXV for safe custody. I find it proper to reproduce the said authority letter in order to appreciate its contents. The Appellant wrote to the bank as follows:

" Re: Authority To Use The Vehicle Log Book Registered No KBH XXXV To Secure A Loan

I Boniface Wanyama of ID No 569XXXX of P.O. Box 5598-30100, Eldoret being the registered owner of above-mentioned vehicle hereby extent y full express authority to Mr. Jonah Kariuki Mwaura to use my vehicle logbook as part of security to secure a loan from the Equity Bank, Market Branch, Eldoret respectively."

33. That is the letter confirmed to have been given to the 1st Respondent by the Appellant. Perhaps let me highlight the significance of the authority letter in any transaction. Better still, did the Appellant donate power of attorney?

34. According to *Black's Law Dictionary*, a Power of Attorney is:

" An instrument authorizing a person to act as the agent or attorney of the person granting it."

35. The power of attorney in Kenya is used to allow another person to act as if it was the person that is giving the power of attorney. Examples are in transactions for sale of land, registration of intellectual property, filing of lawsuits, signing off on documents, opening of a bank account etc.

36. The letter of authority herein confirms that indeed the Appellant donated power to the 1st Respondent specifically to secure a loan using motor vehicle KBH XXXV as collateral. The Appellant appears to insist that he never signed any transfer forms in the said transaction. I am of the considered view that the power donated to the 1st Respondent was in itself sufficient to enable the 1st Respondent oversee the process of acquiring the said facility. The effect of this is that the Appellant acted as a surety given that he is the registered owner of the subject motor vehicle.

37. In any event, ownership of motor vehicle registration KBH XXXV has not been transferred to the 2nd Respondent. The question of joint registration does not connote a complete transfer of interests to the lender but simply interests to the extent that the lender has a right to recover the loan amount in the event one defaults.

38. Of registration of the chattel instrument, the 2nd Respondent did not come out clear on this issue and I must state that on a review of all the material on record, the procedures regarding this transaction were wanting. However, without delving much into it, I agree with the court of appeal's sentiments in *K-Rep Bank Limited v George Ndege Okello* (2015) eKLR that the invalidity of any collateral does not defeat or

obliterate the outstanding amount of the loan. It simply renders recovery through the realization of the collateral impossible and leaves the creditor to recover by other available means including court action.

39. In the foregoing, there is no dispute that a loan was advanced to the 1st Respondent by the 2nd Respondent using the Appellant's motor vehicle as collateral. The Appellant confirmed on cross examination at the trial court to have given authority to that transaction. Therefore, he cannot cry foul and question the process of acquiring the loan.

40. A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. See the case of *Nancy Muthoni Nyaruai v Grace Wanjiku Mugure* [2021] eKLR. In the instant case, the appellant made allegations of fraud but clearly, he had donated authority to the 1st Respondent.

41. Accordingly, it is my opinion that the trial magistrate was right in holding that Appellant was not deserving of the orders sought. The Appellant was fully aware of the implications of giving out his motor vehicle as a collateral.

42. The interpretation of this Appeal gives rise to the law of contract which states that when the goods or chattels are bailed for securing payment of a debt or performers of a promise, the bailer will get a right for the return of the said goods or chattels when the purpose is accomplished namely: the debt is returned or the promise is performed. The persuasive case in *The Official Assignee of Bombay v Madholal Sindhu and others* 40 AIR 1947 the court observed that "Another right resulting by the common law, from the contract of pledge is the right to sell the pledge, where there has been a default in the pledge in complying with his engagement, but a sale before default will be a conversion. Similarly in *Halsbury's Laws of England* Vol, 8 Third Edn para 248 & 143 it is stated that as a general rule any person can enter into a binding contract to wave the benefits conferred upon him by an Act of Parliament, or a it is said can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to Public Policy. Statutory conditions may however be imposed in such terms that they cannot be waived by agreement and in certain circumstances the legislature as expressed that any such agreement shall be void. The Appellant in this case If you were to succeed must prove performance of or readiness and willingness to perform the contract according to its true construction. It is essential to note that this aspects be kept in mind by the court while examining the question of the fundamental principles relating to law of pledge being the special law should be applied to defeat the claim by the Appellant. In my opinion, such an obligation vested with the Appellant to repay the loan should be read into the contract as the nature of the contract itself implicitly requires no more no less, in other words of necessity I do not think this approach involves any innovation as regards the law of contract.

43. In the end, it is evident that there was a default and notices were duly served upon the 1st Respondent who has not been able to make good of the loan amount. The Appellant being a surety is then under an obligation to have the amount repaid. It is not in the business of courts to sanitize a default occasioned by the 1st Respondent. The 2nd Respondent equally has a right to recover the loan amount.

44. The upshot of this is that the appeal is dismissed in the following terms:

    a. That there is no order to issue barring the respondent, their agents and or servants from attaching motor vehicle registration No KPH XXXV which belong to the Appellant.

    b. That an order for return of the aforesaid motor vehicle unconditionally to the Appellant

    c. That the Appellant has not discharged the burden of proof on a balance of probabilities that the 2nd respondent's transfer was illegal and unlawful for it to be revoked by this court.

d. Costs to this Appeal be paid by the Appellant.

45. Orders accordingly.

SIGNED, DATE AND DELIVERED VIA EMAIL AT ELDORET THIS 9TH DAY OF AUGUST 2024.

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R. NYAKUNDI

JUDGE