Odote v Mycredit Limited & another (Civil Appeal E306 of 2023)
[2024] KEHC 16944 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 16944 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E306 OF 2023

F WANGARI, J

SEPTEMBER 20, 2024

BETWEEN

RICHARD ODIRA ODOTE ..... APPELLANT

AND

MYCREDIT LIMITED ..... 1ST RESPONDENT

KINGSTAR AUCTIONEERS ..... 2ND RESPONDENT

(Being an appeal from the Judgement and Orders of the Senior Resident Magistrate Hon. Nyariki, J in MCCC No. 1534 of 2022 delivered on 17th October, 2023)

JUDGMENT

1. This Appeal arises from a Judgement and Order delivered on 17th October, 2023 by Hon. Nyariki, J, Senior Resident Magistrate in Mombasa Civil Suit No. 1534 of 2022.
2. The Appellant filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
    a. That Learned Trial Magistrate erred on the facts and the law and thereby failed to reach a decision that was based on the facts before him, protected by the law that would do justice to the parties;
    b. The Learned Trial Magistrate identified one issue for trial and closed his mind to other equally important issues disputed such as non-service of notice of default to pay, exorbitant interest rate charged and repossession without proclamation;
    c. The Learned Trial Magistrate failed to analyze with an open mind the evidence placed before him hence the wrong finding that there was a valid agreement binding the parties;

d. The Learned Trial Magistrate erred in law and in facts by turning a blind eye to the veracity of the forensic evidence tendered by Directorate of Criminal Investigation which was not disputed by the Respondent in any way;

e. The Learned Trial Magistrate erred on the pleadings and testimonies of the parties by brushing aside forensic evidence that concluded the Appellant did not sign the loan agreement;

f. The Learned Trial Magistrate erred in law and facts by reaching a conclusion that the Appellant had defaulted whereas there was clear evidence that the late payments were caused by the 1st Respondent's failure to process logbook and provide loan agreement for signature and terms of repayment as indicated in the Appellant's affidavit dated 27th October, 2022;

g. The Learned Trial Magistrate erred in law and the facts by failing to apply the law of banking and Central Bank of Kenya together with the regulations to the facts presented before him thus reached a wrong finding that was oppressive and against the law;

h. The Learned Trial Magistrate erred in law and the facts by turning a blind eye to documented evidence admitted by the Respondent that it charged 5% interest per month cumulatively equivalent to 60% interest rate per annum that was oppressive and illegal;

i. The Learned Trial Magistrate erred in law and the facts which resulted in his failure to discern the case before him hence an application of case law that was distinguishable to the facts of the case hence the wrong decision; and

j. The Learned Trial Magistrate erred in law and the facts by coming to the conclusion that there was valid notice of proclamation in the absence of any evidence on record.

3. He thus prayed that that the judgement of the Senior Resident Magistrate Hon. Nyariki, J delivered on 17th October, 2023 at Mombasa be set aside and substituted with the judgement of the court, the Appellant be awarded costs of this appeal and the lower court and any other orders the Honourable Court will deem just to make in the circumstances to meet the ends of justice.

4. Directions were taken to have the appeal disposed off by way of written submissions. Both parties duly complied with the court's directions. The Appellant's submissions are undated while those of the Respondents are dated 20th May, 2024. I am grateful to both parties for the industry they put in by filing well researched submissions and cited various decided cases of this court and other superior courts. They go a long way in guiding the court in making its decision either way.

Analysis

5. This Court has carefully considered the Record of Appeal, the parties' rival submissions and the authorities cited and the only issue that falls for this Court's determination is whether the Trial Court erred in dismissing the Appellant's suit and entering judgement in favour of the Respondents as per the counter-claim.

6. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence and consider arguments by parties and apply the law thereto, and, make its own determination of the issue or issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

7. This was aptly stated by the Court of Appeal in the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123 as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

8. I have perused the Memorandum of Appeal and the entire record of the Trial Court and I am alive to the fact that my task is to re-evaluate the evidence in order to establish whether or not the Trial Court erred in its findings.

9. In his plaint dated 27th October, 2022 and filed on 28th October, 2022 sought for a raft of orders among them that the declaration that the repossession of motor vehicle registration number KCX 272V on 15th October, 2022 was in breach of the law and contract and the same be restored and/or revoked. In support of his claim, the Appellant called two (2) witnesses. Himself as PW1 and one Gilbert Tonui an Inspector of Police as PW2. On their part, the Respondents called one witness, one David Kairu.

10. The Trial Court upon considering the evidence tendered, the submissions by parties as well as the law dismissed the Appellant's suit and entered judgement for the Respondents as sought in the counter-claim. This is what precipitated the present appeal.

11. It is not in dispute that the Appellant applied for a loan facility from the Respondent. It is equally not denied that the loan amount was disbursed to the Appellant on the strength of a security of his motor vehicle registration number KCX 272V (suit motor vehicle). Further, it is common ground that the Appellant defaulted in his obligation to repay the loan as agreed. This led to the 1st Respondent to instruct the 2nd Respondent to proclaim the suit motor vehicle and have it repossessed.

12. Both parties are in agreement that the suit motor vehicle upon repossession was sold to a third party. The Appellant's contentions are as follows; that he never signed the offer letter giving rise to the contract, the interest rates were exorbitant and illegal, the 2nd Respondent did not comply with the *Auctioneers Act* and the Rules in terms of repossession and subsequent sale and lastly, that despite availing a report by the Directorate of Criminal Investigation showing that the signature on the loan agreement was a forgery, the Trial Court proceeded to dismiss his suit.

13. In its judgement, the Trial Court framed three (3) issues for determination among them whether there existed a binding agreement between the parties. The Trial Court answered the first issue in the affirmative. This court while re-evaluating and/or re-assessing the evidence tendered before the Trial Court finds that indeed there existed a valid agreement or contract between the Appellant and the 1st Respondent.

14. It would be inimical for a financial institution such as the 1st Respondent to disburse a sum of over Kshs. 600,000/= with nothing binding a party. Though the Appellant stated that he had not signed any agreement with the 1st Respondent, it defeats logic how he received the disbursed amount and pledged his motor vehicle as security. As correctly found by the Trial Court, the role of courts is not to write parties' contracts but only to give effect to them.

15. In National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court of Appeal held as follows: -

> "...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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge..."

16. The court cited with approval Shah, JA statement in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported) where it was observed as follows: -

> "...It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain..."

17. The Appellant's complains that the interest rate applied was exorbitant and illegal was well within the purview of what he contracted. It would be onerous if this court was to step into an arena where parties' voluntarily contracted unless there is evidence of coercion, fraud or undue influence.

18. Indeed, the Appellant alleged that the signature appearing on the offer letter was a forgery. In furtherance of this position, PW2, a document examiner was called. Though he stated that the signatures appearing on the offer letter had been signed by different persons, the witness on cross examination confirmed that a party can have different signatures. Furthermore, he did not witness the Appellant sign the specimen signatures but only received them from one PC Gabriel Kiplangat, the Investigating Officer.

19. Courts have held that expert evidence ought not to be accepted as a matter of course but has to be considered alongside other evidence. In Dhalay v Republic (1995 – 1998) EA 29, the Court of Appeal held as follows: -

> "...Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it..."

20. The same court in Rose Kaiza v Angelo Mpanju Kaiza [2009] eKLR concluded thus: -

> "...We think the duty of the court in weighing the opinion evidence of an expert would be more onerous where such opinion is the only material for consideration, than where there is direct evidence on the author of the handwriting..."

21. The Trial Court did not believe the evidence of PW2 on the issue of the signatures. Considering that the Trial Court had the benefit of hearing and watching the demeanor of this witness, it would be a dereliction if this court were to find to the contrary without the benefit of this direct evidence that the Trial Court possessed. To this end, the Trial Court's holding on the existence of the contract cannot be impeached and I proceed to uphold the same.

22. On entering judgement in favour of the Respondents as per the counter-claim, out of the ten (10) grounds preferred by the Appellant, none questions the Trial Court's entry of judgement in favour of the Respondents. As such, the same remains undisturbed.

23. Lastly, out of the loan of Kshs. 750,000/= disbursed to the Appellant, both parties confirmed that the Appellant had repaid Kshs. 202,000/=. In their submissions, the Respondents indicated that the Appellant had an outstanding balance of Kshs. 1,032,833/=. The loan became non-performing way back in September, 2022 and the continued loading of interest and penalties was no longer tenable. This court is alive to the in duplum rule.

24. The rule was introduced in Kenyan laws to tame the appetite of lenders who had made recovery of interest on advances a cash cow. It was intended to protect borrowers from exorbitant interest accumulation on loans and limit the amount recoverable by a lender on a defaulted facility to no more than double the principal owing when the loan had become non-performing plus recovery expenses. The continued imposition of interest and penalties on non-performing loan accounts even when the interest and penalties had exceeded the principal amount violates the in duplum rule. To this extent, interest payable shall not exceed the principal amount.

25. Further, is equally true that the Respondents caused to be sold the suit motor vehicle to a Third Party. Interestingly, the Respondents do not disclose how much proceeds did the suit motor vehicle fetched.

26. It would amount to unjust enrichment if the Respondents and particularly the 1st Respondent was to be allowed to keep the suit motor vehicle's proceeds without disclosing the same to the Appellant. Similarly, the 1st Respondent is duty-bound to disclose to the Appellant how the said proceeds were applied towards reducing the loan amount. The court directs that the same be done by way of furnishing accounts and more particularly about the proceeds of the suit motor vehicle.

    On costs, the same follows the event. Though the appeal only succeeds to the extent of application of interest in accordance with the in duplum rule, this court reserves its discretion as to the award of costs. I make no orders as to costs. Though this appeal has been substantively considered, there is the pending compliance as to the statement of accounts concerning the suit motor vehicle which the 1st Respondent has to furnish this court. Final orders to issue upon the Respondents' furnishing of accounts and motor vehicle sale documents.

27. The upshot of the foregoing is that the court renders itself as hereunder: -

    a. The Appeal lacks merit in so far as the Appellant's prayers are concerned and the same is hereby dismissed;

    b. The 1st Respondent in strict compliance with the in duplum rule to only collect interest if any upon factoring in the suit motor vehicle's proceeds;

    c. The 1st Respondent to file and serve a statement of accounts in relation to the suit motor vehicle's sale as well as documents in support of the said sale within fourteen (14) days' from the date hereof;

    d. Final orders to issue upon satisfactory compliance of (c) above; and

    e. No orders as to costs.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF SEPTEMBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

M/S. Saisi Advocate for the Appellant;

M/S Kitoo Advocate for the Respondents;

Ms. Salwa, Court Assistant