



Keitany v SBM Bank Limited; Kipchumba (Interested Party) (Civil Suit 8 of 2019) [2023] KEHC 17510 (KLR) (17 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 8 OF 2019
RN NYAKUNDI, J
MAY 17, 2023**

BETWEEN

STEPHEN KIPKOECH KEITANY PLAINTIFF

AND

SBM BANK LIMITED DEFENDANT

AND

CHEBII JEOFREY KIPCHUMBA INTERESTED PARTY

JUDGMENT

1. By an amended Plaint dated March 5, 2019, the Plaintiff, Stephen Kipkoech Keitany, sought for the following orders: -
 1. An order of specific performance ordering and compelling the Defendant to forthwith deliver up and or release a clean logbook for motor vehicle registration number xxxx to the Plaintiff.
 2. An order declaring the charges termed as service provider fee in Chebiii Jeoffrey Kipchumba & Another V Chase Bank and charged by the Defendnat to the Plaintiff's account with it to be null and void and that damages be paid to the Plaintiff by the Defendant.
 3. Costs of this suit.
 4. Any other relief sought that this Honourable Court may deem fit and just to garnt.

Background

2. This matter emanates from a lower Court matter being Eldoret CMCC No 654 of 2014, wherein the Interested Party herein had sued both the Plaintiff and the Defendant for failing to release the logbook of motor vehicle registration number xxxx, belonging to the Plaintiff but charged with the Defendant.



Whereas Interested party claimed to have paid the full consideration of the suit motor vehicle, the Defendant on the over had claimed legal fees from the Plaintiff arising from the said proceedings.

The Plaintiff' Case

3. The Plaintiff is opposed to paying the Defendant's costs arising from the application dated August 17, 2015 filed in Eldoret CMCC No 654 of 2014. The Plaintiff contends that the said application was filed by the Defendant herein, wherein it sought to be struck out of the said Court proceedings. The Plaintiff maintains that the said application was disposed of by consent and thus there were no costs arising therefrom.
4. The Plaintiff further contends that he did not enjoin the Defendant herein in Eldoret CMCC No 654 of 2014 and thus should be condemned to pay costs arising therefrom. According to the Plaintiff in the said suit he was only a co-defendant with the Defendant having been both sued by the Interested Party herein.
5. The Plaintiff contends that he never instructed the firm of Mulondo, Oundo, Muriuki & Company Advocates to represent him in the lower Court's suit. That the said firm did not offer any legal services to the him in the said suit so as to warrant him to pay legal fees arising therefrom. The Plaintiff maintains that in the said suit he was ably represented by the firm of RM Wafula & Company Advocates.
6. The Plaintiff further maintains that the Defendant did not file any bill of costs for assessment and issuance of a certificate of costs arising from the application dated August 17, 2015. That there is no legal basis to justify Kshs 132,316.40 being claimed by the Defendant herein as costs disguised as service provider fees. The Plaintiff contends that Order 21 Rule 9A of the Civil Procedure Rules provides; that a party claiming costs at a Magistrates Court shall file a written request, statement of costs and supporting documents with the Court and serve it on the other parties with a breakdown of the costs sought.
7. According to the Plaintiff, it will be against the principles of natural justice to compel him to pay legal fees twice. The Plaintiff maintains that the said charges of Kshs 132,316.40/= are not only illegal but also unconscionable and are only meant to frustrate him and milk his pockets dry. The Plaintiff further contends that it has since paid the amount owed to the Defendant to the very last coin and hence ought not be bothered again. That the loan statements account from the Defendant as at July 25, 2017 indicate that the account balance was zero. The Plaintiff further contends that during cross-examination, the Defendant's witness Mr Alex Mboboa confirmed the Plaintiff had cleared the loan amount.
8. The Plaintiff maintained that he is ready and willing to abide by the Court orders that were issued on March 8, 2017 in Eldoret CMCC No 654 of 2014. That the Defendant herein has the original logbook with respect to motor vehicle registration number xxxx, Toyota Corolla, a document the Interested Party is entitled to. According to the Plaintiff, the Defendant is not morally and legally justified to continue retaining the original logbook with respect to the suit motor vehicle as he has cleared the loan amount, he owed it.
9. The Plaintiff blames the Defendant for non-compliance with the decree that was issued by the Court in Eldoret CMCC No 654 of 2014.
10. The Plaintiff urged the Court to issue the orders sought as prayed.



The Defendant's Case

11. The Defendant's Case is that on or about 2012, the Plaintiff herein was desirous of purchasing a motor vehicle. That the Plaintiff approached the Defendant, who agreed to enter into a hire purchase agreement with him for the sum of Kshs 665,000/=. The suit motor vehicle was used as the collateral for the loan amount and was duly registered in the joint names of the Plaintiff and Defendant. The Defendant deposed that it retained the original logbook as security until the Plaintiff fully repaid the loan facility.
12. The Defendant contends that the Plaintiff soon fell into arrears and instead of approaching it with the view of restructuring the loan, he sold the suit motor vehicle to the Interested Party herein without informing it. The Defendant maintains that the Plaintiff took a long time to clear the outstanding loan amount and the accrued interests which made the Interested Party herein, then unaware of what was happening to institute a suit against him vide Eldoret CMCC No 654 of 2014; Chebii Geoffrey Kipchumba V Stephen Kipkoech & Chase Bank.
13. The Defendant further deposed that subsequently, Chase Bank then instructed a firm of Advocates to represent it in the matter who filed a memorandum of appearance and statement of defence. That Chase Bank, through its Advocates on record later filed a Chamber Summons Application dated August 17, 2015 in which it sought to be struck out from the subject suit as the same did not disclose any cause of action against it. That parties later executed a consent which was adopted and the bank's name was struck out of the suit.
14. The Defendant further deposed that sometime in October, 2017, the Plaintiff herein averred that he paid what according to him was the outstanding loan amount. The bank however thought otherwise and retained his log book for non-payment of Kshs 127,800.88/= being expenses incurred in instructing its Advocates to defend the suit in Eldoret CMCC No 654 of 2014.
15. The Defendant blames the Plaintiff herein for being a party in the Interested Party's case for reasons that the Plaintiff was aware of the Defendant's interest over the suit motor vehicle but yet still sold it to the interested party. That the Plaintiff failed to disclose to the Defendant the intended sale nor the sale itself and further also concealed from the Interested Party that the suit motor vehicle was encumbered and that the Defendant's interest ranked in priority.
16. The Defendant contends that despite selling the suit motor vehicle for Kshs 650,000/= on December 18, 2013, the Plaintiff failed to remit the said funds to it with a view of clearing the loan amount which at the time stood at Kshs 491,633/= and prevent the eventuality of Eldoret CMCC No 654 of 2014.
17. The Defendant further contends that even after **Eldoret CMCC No 654 of 2014**, the Plaintiff failed to resolve the dispute between him and the Interested Party by paying the outstanding sum, he allowed the Interested Party to drag and humiliate the Defendant's dignity by dragging it to that suit. The Defendant maintains that it took its Advocates' intervention for it to be removed from the said suit. The Defendant contends that through the Plaintiff's inaction of concealing such material facts, it incurred unnecessary costs of Kshs 127,800.88/= for instructing a firm of advocates to represent them and that currently the amount has since attracted interest and currently stands at Kshs 132,316.40/=.
18. The Defendant maintains that the Plaintiff should shoulder the said legal expenses that it incurred due to the Plaintiff's inactions.
19. The Defendant contends that despite the Plaintiff testifying that he was not aware of the said charges. During cross-examination he conceded that he was indeed aware.



20. Regarding the prayers sought the Defendant position is that it has justified its position for levying the foregoing service provider fees. The Defendant maintains that at the time when the Plaintiff claims to have paid the outstanding loan amount via a bank cheque dated October 16, 2017, it was long after it had served him with the fee note from its Advocate on April, 2017. The Defendant contends that the fact the note was not addressed in the name of the Plaintiff does not negate the fact that he should shoulder the unnecessary expenses that were incurred by it in defending Eldoret CMCC No 654 of 2014.
21. Regarding costs, the Defendant's position is that the Plaintiff is not entitled to any costs at all as he cannot benefit from his own wrong doing that precipitated the institution of Eldoret CMCC No 654 of 2014. The Defendant maintains that costs are at the discretion of the court.
22. The Defendant urged the Court to award it Kshs 132,316.40/= being costs that it incurred as a result of the Plaintiff's inactions and further urged the Court to dismiss the Plaintiff's costs with to the Defendant.

The Interested Party's Case

23. The Interested Party's case is that it sued the Plaintiff and the Defendant in Eldoret CMCC No 654 of 2014; for failing to release the logbook of the suit motor vehicle. The Interested Party contends that the Defendant herein who was the 2nd Defendant in Eldoret CMCC No 654 of 2014 was excluded from the said proceeding vide the consent dated October 3, 2015 as it was a merely a lender. That said suit proceeded to full hearing and judgment was delivered on September 15, 2016 in favour of him. That the Plaintiff was ordered to clear the outstanding loan amount with the Defendant so as to enable the smooth transfer of the suit motor vehicle.
24. According to the Interested Party, the Plaintiff herein on July 27, 2017, had cleared the entire loan amount and was ready to execute all the transfer documents when the Defendant imposed Kshs 127,800.88/= allegedly as service provider fee and the same was debited on the Plaintiff's account further frustrating the transfer.
25. The Interested Party maintains that the impugned figure of Kshs 127,800.88/= was not subjected to taxation. The Interested Party contends that the only institution in law mandated to assess and tax bills of cost arising from court proceedings is the Magistrate's Court. The Interested Party contends that during the hearing, the Defendant conceded that it had not taxed the said amount and therefore did not have a certificate of costs to that effect. According to the Interested Party the impugned charges are speculative and only amounts to extortion of innocent members of the public being the Plaintiff herein. According to the Interested Party, the Advocate's fees in question ought to have been paid by the Defendant herein and not to shift the said burden to the Plaintiff. The Interested Party maintains that if the Plaintiff was at all to pay costs then the same ought to have been determined by a taxing master. The Interested Party contends that the Defendant herein never filed any Bill of costs.
26. The Interested Party maintains that the Plaintiff herein has proved his case on a balance of probabilities and therefore ought to be granted the reliefs being sought.

Determination

27. I have carefully considered the pleadings and the parties' respective submissions. The only issue for determination is whether the orders sought can be issued.



28. I will first address the issue as to whether the Plaintiff should pay the Defendant Kshs 132,316.40/= being costs incurred to defending the suit in Eldoret CMCC No 654 of 2014 and whether the said costs are null and void.
29. The Defendant herein has blamed the Plaintiff for incurring the aforementioned costs being the legal fees due to its Advocates as a result of defending it in Eldoret CMCC No 654 of 2014. The Defendant contends that as a result of the Plaintiff's inactions regarding the suit motor vehicle it was sued by the Interested Party in Eldoret CMCC No 654 of 2014, wherein the Interested Party sought for the release of the suit motor vehicle's logbook being held by the Defendant. The Defendant maintains that if the Plaintiff had not concealed material facts regarding the suit motor vehicle then the Interested Party would not have instituted the aforementioned proceedings.
30. Rule 10 of the [Advocates Remuneration Order](#) provides;
- 'The taxing officer for the taxation of bills under this Order shall be the Registrar or a district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under Schedule 4 to the order the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.'
31. In [Donholm Rabisi Stores \(firm\) V East African Portland Cement Ltd \[2005\] eKLR Waweru J](#) held:
- ' Taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the taxing officer by the Advocates Remuneration Order. The court will not be drawn into the arena of taxation except by way of reference (from a decision on taxation) made under Rule 11 of the Advocates Remuneration Order.'
32. In present case, save for seeking Kshs 132,316.40/= as legal costs incurred by the Defendant in defending the suit in Eldoret CMCC No 654 of 2014, the Defendant has not provided any evidence that the said amount was in fact taxed by the taxing master in accordance with the provisions law. There is no evidence on record to show that a Certificate of costs was issued to the Defendant to warrant the Plaintiff to pay the said amount. As much as the Defendant blames the Plaintiff for incurring the said unnecessary costs, this Court cannot compel the Plaintiff to pay the Defendant the said amount without proof a Certificate of costs to that effect. There is no justification whatsoever to warrant the Court to compel the Plaintiff to pay for the alleged costs.
33. It is also worth pointing out that the Chamber Summons application dated August 17, 2015, filed by the Defendant herein in Eldoret CMCC No 654 of 2014, was resolved by consent dated October 3, 2015. The said consent however, did not address the issue of costs arising out of the proceedings therein. To my mind the same has not been reviewed and or varied and such the Defendant cannot claim costs arising from the proceedings therein having been struck out by virtue of the consent dated October 3, 2015, which consent was silent on the issue of costs.
34. On whether an order of specific performance should issue to compel the Defendant to for with release the suit motor vehicle's log book. Granting of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. See the Case of [Reliable Electrical Engineers Ltd Vs Mantrac Kenya Limited \(2006\) eKLR](#), wherein Justice Maraga (as he then was) stated that: -
- ' Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles'



'The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.'

35. It not disputed that the Plaintiff herein approached the Defendant for a loan facility of Kshs 665,000/= for purposes of purchasing the suit motor vehicle. It is not also not in dispute that the Plaintiff herein at some point default repaying the said amount and sold the suit motor vehicle to the Interested Party without knowledge of the Defendant. As result of which the Interested Party herein sued both the Plaintiff and the Defendant in Eldoret CMCC No 654 of 2014, seeking the release of the suit motor vehicle's logbook having paid the full consideration. At the trial Court the Defendant was struck out of the proceedings and judgment was entered against the Plaintiff in favour the Interested party requiring him to clear the loan amount so as ease the transfer of the suit motor vehicle.
36. The only reason why the said logbook has not been released is due to the fact that the Defendant seeks to be paid Kshs 132,316.40/= being costs it incurred as legal fees in defending the suit in Eldoret CMCC No 654 of 2014. Having already rendered myself on the said issue it is in fact not disputed that the Plaintiff herein was able to make good his default by repaying the loan amount being owed to the bank. This is also demonstrated by the Defendant's witness Mr Alex Mbobo, who during cross-examination confirmed to court that indeed the Plaintiff had repaid his loan in full. From the statement of account dated November 27, 2017 is also evident that the loan balance was zero shillings.
37. With the above mind there is no reason whatsoever for the bank to continue holding hostage the suit motor vehicle's logbook. The Plaintiff has cleared his loan and therefore ought to have the suit motor vehicle's logbook back. The bank cannot continue to hold on to the Plaintiff's logbook by virtue of seeking costs that were in the first place never awarded and having been subjected to taxation in accordance with the provisions of the law.
38. Flowing from the above I find no reason for the bank to continue holding on to the suit motor vehicle's logbook where it is evident that the loan amount in question has been repaid in full.
39. In the end, I hereby order as follows: -
 1. The Defendant herein, SBM Bank Ltd, be and is hereby ordered to immediately release the logbook to motor vehicle registration number xxxx, being the Plaintiff's property for the loan facility granted in relation thereto having paid and or cleared the said amount in full.
 2. Each party to pay their own costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF MAY , 2023.

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R. NYAKUNDI

JUDGE



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