



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CIVIL APPEAL NO. 39 OF 2017

NICHOLAS MAHIHU MURIITHI.....APPLICANT

VERSUS

TAIFA SACCO LIMITED.....RESPONDENT

JUDGEMENT

1. This is an appeal against the judgement of the Cooperative Tribunal sitting at Nyeri in Tribunal case No. 14 of 2014. The respondent's claim against the appellant was for Kshs.1,260,859.33/= plus interests as well as costs of the suit that arose from a facility advanced to the appellant by the respondent. The claim was successful and the Tribunal entered judgment in favour of the Respondent for Kshs.1,118,401/= plus interest at court rates from the date of filing the suit till payment in full.

2. Being aggrieved by the decision of the Tribunal the appellant lodged the instant appeal citing 5 grounds that the Tribunal erred in law and in fact in failing to resolve all the issues for determination; in failing to consider the appellant's counterclaim; in failing to consider the authorities cited by the appellant; that the decision of the Tribunal was against the weight of the evidence and that the judgement of the Honourable Tribunal did not comply with the principles for writing of judgement set out under Order 21 of the Civil Procedure Rule, 2010.

3. The parties agreed to dispose of the appeal by way of written submissions.

Appellant's Submissions

4. The appellant's submitted that the Tribunal only addressed issues by the respondent herein and ignored his case especially the prayers in the counter-claim. Particularly, the Tribunal failed to determine whether the claim amounted to unjust enrichment and double jeopardy and whether the claimant was negligent in the manner it handled the loan accounts. The appellant relied on the case of **Apollo Insurance company Limited Vs. East African Development bank & another [2016] eKLR** where the judgement of the High court was challenged on the grounds that the trial judge failed to resolve all the issues.

5. Making reference to the case of **Daniel Okoth Vs Kenya national Commission of Human Rights [2017] eKLR** the appellants submitted that the Tribunal erred in law by not considering his submissions and authorities, which were filed on 3/2/2017 and hence the Tribunal did not afford the appellant a fair hearing.

6. The appellant further submitted that the respondent did not specifically plead nor prove its case as this was a special damages claim relying on the cases of **Capital Fish Kenya Limited Vs The Kenya Power & Lighting Company Limited [2016] eKLR** and **Independent Electoral & Boundaries commission & Another Vs Stephen Mutinda Mule & 3 Others [2014] eKLR**.

7. The appellant concluded his submissions making reference to the case of **Regina Karimi Mbuchi & 2 others Vs Francis Mbuchi Kithaka[2018] eKLR** where the court upheld an appeal because the court failed to frame the issues for determination and failed to consider the appellant's counterclaim. The appellant stated that the Tribunal failed to adhere to Oder 21 Rule 4 of the Civil Procedure Rules, in that it did not frame the issues for determination neither did it make a decision on each issue nor give reasons for such decisions.

8. It was the respondent's submission that the appellant did admit to receiving the loan from the respondent herein, and that indeed, the Tribunal did frame the issues for determination and considered them as regards the claim and the counterclaim. The respondent further stated that the appellant did not prove its case asset out in the counter claim for he did not lead any evidence on the alleged negligence on handling his account and therefore no damages could stem from a claim that was not proved.

9. On the issue of the logbook, the respondent submitted that since the Tribunal found that the appellant had not repaid the loan, the respondent had every right in retaining the logbook as security for the loan and therefore the Tribunal did not order the respondent to return it to appellant.

10. The respondent further submitted that by the appellant's admission that he had not repaid the loan, the decision of the tribunal could not have been made against the weight of the evidence. Although appellant wrote a letter and gave out some cheques for loan repayments, one of them was returned unpaid for lack of funds which was not denied.

11. The respondent concluded its submissions by stating that the Tribunal did comply with Order 21 Rule 4 by framing the issues and making a consideration of all the issues raised by the parties. On the issue of interest, the respondent argued that the Tribunal found no grounds justifying calculation at bank rates and instead held that it be paid at court rates which was in order.

12. The issues for determination in this appeal are :-

- a. Whether the respondent proved his case on the balance of probabilities.
- b. Whether the Honourable Tribunal considered the counter claim of the appellant as well as the authorities cited by him.
- c. Whether the Tribunal complied with the principles set out under Order 21 of the Civil Procedure rule, 2010 for preparing judgement.

13. Being a first appeal, the court relies on a number of principles as set out in **Selle and Another Vs. Associated Motor Boat Company Ltd. & others [1968]1EA 123** set out as follows:-

.....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 ."

14. It was held in **Mwangi Vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

15. The Court of Appeal in **Kiruga Vs Kiruga & another [1988] KLR 348** observed that:-

"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

16. Therefore the Court is under a duty to delve into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the case was proved on the balance of Probabilities

17. I have perused the entire record of appeal and considered the submissions by the counsels for both parties. The burden of proof in civil cases on a balance of probability. **Denning J. in Miller Vs Minister of Pensions [1974]** discussing that burden of proof had this to say:-

"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 of preponderance 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."

18. Section 107 and 108 of the Evidence Act, Cap 80 provides who bears the burden of proof in a case. The sections provide:-

Section 107

Whoever desires any court to give judgement as to legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side

19. The respondent testified that the appellant obtained two loans of Kshs.400,000/= each and further obtained an overdraft in sum of kshs.500,000/=. The respondent produced the loan application forms, various cheque images and statements in respect of the amounts advanced. Additionally, the respondent testified that the appellant had borrowed the funds and deposited a logbook for his motor vehicle as security.

20. The appellant contends that the respondent's case was a special damage claim which was not specifically pleaded or proved. He relied on the case of Richard Okuku Oloo Vs South Nyanza Sugar Co. Ltd.[2013] eKLR wherein it was observed that:-

“We agree with the learned Judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, the degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

In the Jivanji case (Supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Service Limited Vs. Murunga & others Nairobi CA No. 192

21. The record shows that the claim before the tribunal was for the whole claim of the outstanding loans advanced to the appellant amounting to Kshs.1,260,859/=. This was pleaded as required by the law and the respondent adduced evidence in support of the claim. The tribunal was dealing with a liquidated claim but not with a special damage claim. The issue of unpleaded special damages does not in my view arise.

22. On the issue that the respondent was negligent in handling the appellant's loan account, the appellant never led any evidence in court to show that the Respondent was indeed negligent. Under Sections 107 and 108 as discussed above, he who alleges must prove. In this instance, the appellant did not give any evidence as to the negligence of the respondent and thus did not discharge his burden of proof. Therefore, since the claim was not proven, it follows that the issue of damages payable to the appellant did not arise..

23. On the issue of the return of the logbook, the record shows that the appellant did not fully repay the funds advanced to him. For this reason, the security would not have discharged until the loans were cleared. The Tribunal was therefore correct in not ordering the release of the security so long as the facilities remained.

24. Before the tribunal, the respondent claimed for a sum of Kshs.1,260,859.33/= being two loans and an overdraft as well as accumulated interest rates. The claimant's witness testified on how the first loan of Kshs.400,000/= was advanced to the appellant at 18% interest in favour of his business account. On his own application, the appellant was advanced a top up of Kshs.400,000/= on 17/11/2009. An overdraft of Kshs.500,000/= at the interest rate of 28% had been advanced.

25. In regard to repayments, the respondent testified that the appellant issued bouncing cheques that were accompanied by forwarding letters. The respondent produced the bounced cheques and the letters as follows:-

- a) Cheque No. 500180 for Kshs.349,221 and letter dated 03/12/2012
- b) Cheque No. 500181 for Kshs.370,000/= and a letter dated 03/4/2012

26. The appellant gave his logbook for vehicle registration number as security for the loan and the respondent had lien over his household goods as well. The relevant documents were produced in evidence in this regard.

27. The respondent's advocate Wahome Gikonyo & Company issued a demand letter to the appellant for Kshs.1,260,859.33 on 21/9/2012 plus collection charges of Kshs.28,962/= following which the respondents paid minimal amounts on various date amounting to 102,804/=. The only coffee proceeds applied to the loans by the respondent was Kshs.254/=. This demonstrates that no other sums of coffee proceeds were available in the appellant's account for loan repayment.

28. The appellant did not deny that the loan was advanced to him in two phases of Kshs.400,00/= totaling to Kshs.800,000/=. The 3rd facility was an overdraft of Kshs.500,000/= which was also admitted. The security the appellant gave the respondent was a logbook for his vehicle valued at Kshs.4,000,000/= and his coffee proceeds. Evidence was adduced to the effect that the chattels mortgage was done later before the respondent went to court. The appellant argued that the 3rd loan said to be an overdraft did not exist within the society as a facility to members. However, no evidence was produced to support this allegation.

29. During cross-examination, the appellant admitted that he was given an overdraft and that some of the cheques he purported to have used for repayment of the loan were not banked. He did not deny that some of the cheques he issued on presentation for clearance to his bank were returned for lack of funds.

30. On the issue of interest rates, the appellant said that the respondent's Sacco was not a bank and should not charge interest rates on loans. Saccos are known to lend loans to their members on interest rates which are normally lower than the bank rates. Different products of the Sacco may attract different rates. The appellant entered into a loan agreement with the respondent and it follows that the parties are bound by the terms of the agreement. It is not in dispute that the agreement did not exempt the appellant from paying interests. The respondent has not alleged breach of any clause in the agreement.

31. The respondent explained that the overdraft was a separate contract for repayment within two years. It was granted on 31/08/2009 to be fully repaid on 31/08/2011. Since this sum was not paid the respondent was entitled to impose penalty levies as per the contract. The appellant did not present any evidence that he fully repaid the facility. The interest rate was agreed at 28% which the appellant had consented to in the agreement.

32. This court cannot rewrite a contract for the parties and I have said earlier, the parties remain bound by the terms of their contract until the borrower discharges his responsibility.

33. Illegal or wrong entries alleged to have been made were not demonstrated through evidence by the appellant. The appellant also claimed that the respondent refused to credit his coffee proceeds to the repayment of the loan. He did not show which amounts and for what period were not debited to the loan account. The respondent said it was only aware of Kshs.254/= that was available for debit purpose.

34. It was claimed in the counterclaim that unilateral levies and penalties were imposed against the loan account but the appellant did not point out any of those in his evidence.

35. I note that the respondent on the other hand produced loan application forms to prove that it advanced the loans to the appellants as stated in his claim. Loan statements were produced to demonstrate that the loans were not fully paid at the time a demand letter was sent to the appellant Kshs.1,260,859.33/= was owing at that time and that this figure formed the basis of the respondent's claim against the appellant.

36. The appellant claimed that the tribunal failed to decide on the issue whether the respondent's conduct amounted to unjust enrichment or double jeopardy. The record does not show any evidence from the appellant to substantiate, let alone prove the said allegation. In my view the magistrate court had no material upon which to determine this issue. This allegation therefore remained unsupported by evidence and I find that it was not proved.

37. Having evaluated the evidence on record, I come to a conclusion that the tribunal was right to find that the counterclaim was not proved. Indeed it is the respondent who proved his case on the balance of probability and had the judgement given in his favour.

38. In the same breath I find that the magistrate's court determined all the issues before it and that its judgement was based on cogent evidence.

39. It is my finding that this appeal lacks merit and it is hereby dismissed with costs.

40. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 11TH DAY OF MARCH, 2021.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 11th day of March 2021.