



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 257 OF 2019

PETER NJOROGE.....1ST APPELLANT

ANDREW KAMAU NJOROGE.....2ND APPELLANT

ANTONEY WAWERU NJOROGE.....3RD APPELLANT

VERSUS

PETER MUCHIRI NDUNG’U.....RESPONDENT

(Being an appeal from the Judgment and Order delivered on 14th December, 2018

by Hon. P.N. Gesora (Chief Magistrate) Chief Magistrate’s Court

at Nairobi in CMCC No. 7665 of 2018).

JUDGMENT

1. The Respondent, Peter Muchiri Ndungu instituted the suit herein vide a plaint dated 22nd August, 2019. The claim was for Ksh.14,625,000/=, compound interest thereon at 19% p.a. from 1st May, 2018 until payment in full plus the costs of the suit.

2. It was pleaded that the Respondent and the 1st Appellant, Peter Njoroge entered into a loan agreement dated 21st November, 2016 wherein the Respondent advanced the total principal sum of Ksh.8,020,000/= to the 1st Appellant and was repayable in 180 days. That the 2nd Appellant, Andrew Kamau Njoroge and the 3rd Appellant, Anthony Waweru Njoroge guaranteed the repayment of the said loan with interest. It was further stated that the terms set out in the sale agreement were not honoured and the parties met and agreed at the sum of Ksh.14,625,000/= as the outstanding debt as at 1st May, 2018 with compound interest of 19% p.a. until payment in full.

3. The claim was denied as per the Statement of Defence filed by the Appellants. It was averred that the claim of 19% interest was illegal. That the 1st Appellant has been willing to give the Respondent a piece of land worth Ksh.8,020,000/= but the Respondent disputed the value thereof.

4. The Respondent subsequently filed the application dated 11th October, 2018 principally seeking orders **that pending the hearing and determination of this suit, an order of attachment before judgment be granted by:**

(a) An order of prohibition be issued restricting the Defendants from disposing or dealing in L.R. No. Kajiado/Kisaju/515 or sub-divisions thereof; and

(b) An order of attachment be issued against L.R. No. Kajiado/Kisaju/515 or sub-divisions thereof;

5. Secondly, **that judgment on admission be entered for the Plaintiff against the Defendant for Ksh.14,625,000/= with interest as prayed in the Plaint.**

6. The application was premised on the grounds set out in the body of the application and was supported by the affidavit sworn by the

Respondent herein. It was deponed that the Appellants were indebted to the Respondent in the sum of Ksh.14,625,000/= as at 1st May, 2018 which debt was incurred by the Appellants in order to redeem their property **L.R. No. KAJIADO/KISAJU/515** which was under threat of public auction.

7. That the Appellants agreed to sell 5 acres of the said land to the Respondent but later reneged on the same. That the Respondent subsequently agreed to a refund and the parties reconciled the account at Ksh.14,625,000/=with interest at 19% p.a from 1st May, 2015 until payment in full. That the Appellants agreed to pay the said debt from the proceeds of the sale of the aforesated property with the sum equivalent to the debt to be paid to the Respondent and the balance to be paid to the Appellants. That the Title Deed to the property was to be deposited with the Appellants' Advocates as stakeholders but they have failed to deliver the Title Deed to the Respondent and instead the property is being disposed of by the Appellants to possibly avoid attachment and abscond out of the jurisdiction of this court.

8. The application was opposed. It was stated in the replying affidavit that the claim was not admitted in the Statement of Defence filed. That the court did not have the requisite jurisdiction to issue the orders of prohibition and that **LR No. KAJIADO/KISAJU/515** is not the subject matter herein. That due process has not been followed for attachment of the said property before Judgment.

9. It is further stated that the Applicant was purporting to use documents drawn on a "**without prejudice**" basis to support his claim of admission. That the Applicant failed to disclose material facts to the court as the Applicant was offered the aforesated property for sale but the parties did not agree on the purchase price. The Respondents denied that they were selling the aforesated property. It is contended that the Defence raised triable issues which include whether the money was owed and amount thereof, the rate of interest and whether the suit was premature for lack of exhaustion of other remedies

10. The trial magistrate allowed the application together with costs. The Appellants were aggrieved by the said ruling and appeal on the following grounds:

1. The learned magistrate erred in law and fact in finding that there was any admission to the claims in the Plaintiff, whereas no such admission was made in the pleadings by the Defendants.

2. The learned magistrate erred in fact and in law finding for the Plaintiff in the prayer for attachment before judgment in whereas a deserving case for the same has not been made out.

3. The learned magistrate erred in law and fact in granting Orders of disposal for a property that was not the subject matter in the suit before it.

4. The learned magistrate erred in law and fact in assuming jurisdiction over a property that is clearly outside its geographical purview.

5. The learned magistrate erred in law and fact in failing to properly analyze the facts surrounding the case especially, that the indebtedness by the Defendants was not established.

6. The learned magistrate erred in law and fact in failing to find that "without prejudice" documents relied on by the Plaintiffs were inadmissible to prove the Plaintiffs case.

7. The learned magistrate erred in law and fact in compromising a contested suit at an interlocutory stage without proper justification.

8. The learned magistrate erred in law and fact in allowing interest at all and at a rate higher than the court rate and the prevailing commercial rate.

11. The Appeal was canvassed by way of written submissions which this court has considered.

12. This being the first appellate court, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

"An appeal to this Court from a trial by the High 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

13. Order 13 rule 2 Civil Procedure Rules provides:

"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

14. In the case of **Guardian Bank Limited v. Jambo Biscuits Kenya Limited (2014) eKLR** cited by the appellant herein, the court set out the principles of admissions thus:

“.....The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are: Choitram v Nazari (1984) KLE 327 that;-

“...admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.”

Chesoni Ag. JA went on to add that:-

”...an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be ‘of course there was’.

Cassam v Sachania (1982) KLR 191 –

“The judge’s discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment”.”

15. The Appellants in paragraph No. 4 of the plaint denied advancement of Ksh.8,020,000/= to the 1st Appellant or any guarantee thereof by the 2nd and 3rd Appellants. It is also denied that the parties met and agreed on the outstanding debt as Ksh.14,625,000/= as at 1st May, 2018 with compound interest of 19% until payment in full. However, paragraph No. 7 of the Statement of Defence states that the 1st Appellant was willing to give the Respondent a piece of land worth 8,020,000/= agreed upon. This sum of Ksh.8,020,000/= is the same amount pleaded in paragraph No.4 of the plaint as the principle sum advanced by the Respondent to the 1st Appellant.

16. The email dated 8th June, 2018 from the Appellants’ advocates to the Respondent’s Advocate states as follows:

“Dear Sir,

Your email dated 7th June, 2018 refer:

We confirm:

(a) That our client will pay Ksh.14,625,000/= plus interest at 19% from 1st May 2018 until full payment.

(b) That our client has not entered a Sale Agreement over the said property as it stands.

(c) That our client is depositing the original title to be in our custody and we shall not release the said Title to any buyer until your clients claim is settled in full.

Kindly proceed and prepare the draft settlement agreement for our perusal.

Regards

Makena M’Mwirichia

For M.M. Muriuki & Co. Advocates”

This email has no remarks that it is written on a **“without prejudice basis”**

17. The letter dated 19th July, 2018 was written on a **“without prejudice basis”**. The said letter once again admits that Ksh. 8,020,000/= was advanced by the Respondent to the 1st Appellant which money was to be paid as per the agreement between the parties. The letter then proposes that the 1st Appellant was willing to sell five acres of the parcel of land in question to the Respondent.

18. The letter then goes on to state:

“...our client agrees to owing your client Kshs. Eight Million, Twenty Thousand (Ksh.8,020,000/=) with interest stipulated in

the agreements which figure was reached at Kenya shillings Fourteen Million Six Hundred Twenty Five Thousand (Ksh.14,625,000). Our client has tried to negotiating on the 19th % p.a. compound interest which you have remained firm on.”

19. It is abundantly clear that in the email of 8th June, 2018 the 1st Appellant admitted the payment of the sum of Ksh.14,625,000/= plus interest of 19% p.a from 1st May, 2018 until payment in full. The Appellants do not deny having authored this email. The letter dated 19th July, 2018 which is headed “without prejudice basis” came in much later on.

20. It was stated by the Court of appeal in the case of **Ibrahim Musa Mohamed & another v Guardian Bank Ltd [2014] eKLR** while quoting from the case of **Tomlin v Standard Telephones & Cables Ltd [1969] 3ALL ER 201**:

“what is the meaning of the words without prejudice, I think they mean without prejudice to the position of the writer of the letter’s if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.”

(See also **Yusra Restant Ltd v Kenya Conference of Catholic Bishops & another [2014] eKLR**; **Mumia & Sugar Co. Ltd & another v Beatrice Akinyi Omondi [2016] eKLR**)

21. The email of the 8th June, 2018 admitted the existence of the debt of Ksh.14,625,000/= plus interest at 19% from 1st May, 2018 until payment in full. The Respondent accepted the said offer and issued a settlement agreement subsequently on 17th July, 2018 the Respondent made a demand for payment and gave his bank details. There was therefore an offer which was accepted.

22. Looking at the statement of Defence, the email of 8th June, 2019 and the letter dated 19th July, 2018 this court’s conclusion is that the claim was admitted. The trial magistrate did not err in the entry of the judgment on admission.

23. On the rate of interest, the parties agreed, as analyzed above on the payment at 19% with effect from 1st May, 2018. As stated by the Court of Appeal in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2002] EA 503**:

“A court of law cannot rewrite 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 clause.”

24. Order 39 of the Civil Procedure Rules provides for attachment before judgment. The Defendant may at any stage of the case be called upon to furnish security.

Order 39 rule 5 (1) provides as follows:

“(1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

(a) is about to dispose of the whole or any part of his property;

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court,

the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.”

25. In the case at hand, it was pleaded in paragraph No. 2 of the plaint that the 1st Respondent is ordinarily a resident of Maryland, United States of America. It was averred in the supporting affidavit that the 1st Appellant is a resident of United States of America. It was further deponed that the 2nd and 3rd Appellants are sons to the 1st Appellant and that the 1st Appellant gave the 2nd and 3rd Appellants a power of Attorney to dispose of the land. The Respondent further averred that the Appellants failed to involve him in the sale of the land and were proceeding with the sale of the land without his involvement then transfer the proceeds outside this court’s jurisdiction to defeat the course of justice.

26. The Appellants stated in their replying affidavit that the Respondent’s allegations regarding the sale of the land were misleading and not supported by any evidence. There is no evidence given by the Appellants that can assuage the Respondent’s apprehension that the land was being sold.

27. Section 112 of the Evidence Act, Chapter 80 Laws of Kenya stipulates as follows:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

The Appellants who had special knowledge of their circumstances failed to disprove the Respondent's averments.

28. With the foregoing, the upshot is that the Appeal has no merits and is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF MARCH, 2021

B. THURANIRA JADEN

JUDGE