



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO 33 OF 2017

CO-OPERATIVE BANK OF KENYA LTD.....APPELLANT

VERSUS

ELIUD WANYAMA.....1ST RESPONDENT

WILSON GISEMBA ONDARA.....2ND RESPONDENT

(Being an appeal from the judgement and decree of Hon. P.W. Wasike, RM, dated 5/10/2017,

in Kitale CMCC No. 264 of 2012, Eliud Wanyama v Co-operative Bank of Kenya &

Wilson Gisemba Ondara)

JUDGEMENT

The appellant has appealed against both liability and quantum of damages; in which it was found liable to the extent of fifty per cent (50%) in respect of the material loss of the first respondent's property namely an electric posho mill.

In this court the appellant has raised ten grounds of appeal in his memorandum of appeal.

Summary of the evidence.

The evidence of Eliud Wanyama (Pw 1), now the 1st respondent was that he leased his premises to the 2nd respondent; upon which the 2nd respondent operated the business of a diesel posho mill. On the same premises, Pw 1 had installed an electric posho mill of his own. He did not lease this electric posho mill to the 2nd respondent. The 2nd respondent was a lawful tenant of the 1st respondent by virtue of a lease agreement which they had executed.

It was also the evidence of the 1st respondent that he did not take a loan from the appellant bank. It was also his evidence that he was not indebted to the appellant bank.

Furthermore, the evidence of the appellant through Rodah Kemboi (Dw 1) was that the 2nd respondent took a loan from the appellant bank. The 2nd respondent mortgaged both the diesel and the electric posho mills as collateral security. This is clear from the chattels mortgage (exhibit DEX3), which the 2nd respondent signed.

Furthermore, it was the evidence of DW 1 that they advanced a loan in the sum of shs 150,000/=, which is clear from the application form (exhibit DEX1). The 2nd respondent signed the chattels mortgage in which he mortgaged his household goods and the two posho mills. One of the two posho mills was diesel and the other was electric. It was also her evidence that the 2nd respondent defaulted in his loan repayments and that is why they instructed an auctioneer to attach and sell the mortgaged goods. This they did after they were told by the guarantor (Joseph Abuga) of the 2nd respondent that the 2nd respondent had taken other loans using the same goods.

However, Dw 1 was unable to produce evidence to show that the appellant bank had sent to the 2nd respondent a demand letter. Dw 1 also failed to produce evidence that the 2nd respondent had defaulted.

The submissions of the appellant.

I find that the grounds of appeal of the appellant are well covered in his submissions and I therefore need not reproduce them in this judgement. I will therefore proceed to consider counsel's submissions.

Messrs Kidiavai, counsel for the appellant, based on *Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123*, submitted that it is duty of this court to re-assess the evidence and satisfy itself that the decision is well founded. Counsel also cited *Ramji Ratna & Co Ltd v Wood Products (Kenya) Ltd, Civil Appeal No. 117 of 2001*, in which the court observed that in a first appeal, the court is required to re-assess the evidence and make its independent findings, while deferring to findings of fact based on demeanour.

The submissions of the 1st respondent

Messrs Samba & Co. advocates, counsel for the 1st respondent have submitted that this court as a first appeal court is required to re-evaluate the entire evidence and make its independent findings. They cited *Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123* and *Peters v Sunday Post Limited [1958] EA 424*, in support of their submissions. They also cited section 108 and 109 of the Evidence Act (Cap 180) Laws of Kenya in support of their submission that the burden of proof was on the appellant to produce evidence to justify the recklessness of the appellant bank in selling the electric posho mill of the 1st respondent, when the appellant bank already had notice of the claim of the 1st respondent over his electric posho mill.

Based on the evidence on record, counsel submitted that the 2nd respondent should not be condemned to indemnify the appellant bank. Counsel has therefore urged this court to dismiss the appeal of the appellant bank with costs to the 1st respondent.

Findings of the court.

This is a first appeal. As a first appeal court, I am required to re-evaluate the entire evidence and make my own independent findings, while bearing in mind I did not see and hear the witnesses testify: *Selle & Another v Associated Motor Boat Co. Ltd & Others and Peters v Sunday Post Limited, supra*.

I have re-evaluated the entire evidence on record. As a result, I find as follows.

Messrs Kidiavai & Company advocates, counsel for the appellant submitted that since the 2nd respondent had offered the electric posho mill of the 1st respondent as his (the 2nd respondent's) property, he cannot now turn round and claim that he is not the owner of the said electric posho mill. Put differently, he is estopped from claiming that he was not the owner of the said electric posho mill by virtue of section 120 of the Evidence Act (Cap 80) Laws of Kenya.

Counsel has further submitted that the 2nd respondent cannot avoid liability for his indebtedness to the appellant bank. The foregoing submission ignores two fundamental principles of law. First, estoppel is an equitable remedy. Such remedy may only be called in aid of a person who has come to equity with clean hands. There is ample and unchallenged evidence that the electronic posho mill is the property of the 1st respondent (Pw 1). In this regard, the trial court after properly directing its mind found that: *"I have no doubt and I find on the balance of probabilities that the 3rd party (now the 2nd respondent) is not being honest. He pledged the plaintiff's (now the 1st respondent) electric posho mill which he was operating under a lease agreement. He never disputed the tenancy agreement or the plaintiff's claim that the electric posho mill repossessed was for the plaintiff..."* It is clear that the 2nd respondent fraudulently pledged the electric posho mill as collateral security in respect of the loan of shs 150,000/= that the appellant bank advanced to him. In the circumstances, I find that estoppel as an equitable remedy cannot be called in aid to assist him. I therefore reject the submission of counsel in that regard.

The second fundamental principle of law, which counsel ignored is that this court cannot enforce or countenance an illegality. The conduct of the 2nd respondent was illegal in that he pledged the electric posho mill of the 1st respondent as collateral security in favour of the appellant bank, knowing very well that that was not his property. It is also for this reason that I reject the submission of counsel for the appellant in that regard.

Furthermore, counsel for the appellant has also submitted that the appellant bank was justified to attach and sell the 1st respondent's electric posho mill; since it had been pledged and registered as security in favour of the appellant bank.

The foregoing submission runs contrary to the ample evidence on record; which is that the appellant bank proceeded to sell the said electric posho mill of the 1st respondent, after it was notified that the said electric posho mill was the property of the 1st respondent. The appellant bank did not send a demand letter to the second respondent that he had defaulted. Furthermore, the appellant bank did not produce evidence that the 2nd respondent was in default in respect of his payments.

On the evidence on record, I find that the appellant bank acted on the word of the 2nd respondent's guarantor (Joseph Abuga) that the 2nd respondent had intended to sell or had pledged as security for other loans using the same goods. Joseph Abuga was not called to testify by the appellant bank. It therefore follows that his information to the appellant bank that the 2nd respondent intended to sell or use the same pledged chattels as collateral security for other loans was inadmissible hearsay evidence.

The finding of the trial court in respect of the above matter was that: *"The situation was made worse when the defendant failed or neglected to instruct auctioneers to hold the sale of the proclaimed assets as they investigate the claim by the plaintiff on the goods proclaimed. The defendant had themselves failed to exercise ordinary precaution and diligence to confirm that the electric posho mill belonged to the 3rd party.....The sale was done well after the demand notice was issued by the plaintiff's advocates. The defendant never bothered to reply to the letter from the plaintiff 's advocates. The defendant never sought to have audience with the plaintiff to sort or verify his claim on the proclaimed and attached goods. If the immediate foregoing was done I believe this case will not have arisen. The defendant is to blame just*

as the 3rd party who had pledged the plaintiff's electric posho mill."

The foregoing finding by the trial court is amply supported by the evidence on record. It further shows that the appellant bank did not follow the basic elementary rules of proclaiming, attaching and selling of the pledged goods. It summarily sold the goods of both the 1st and second respondents. And in doing so, it wrongfully sold the electric posho mill of the 1st respondent.

After re-evaluating the entire evidence, I find that the judgement and decree appeal against is amply supported by evidence. The appellant bank and the 2nd respondent are equally to blame. This court has no basis to interfere with the findings of the trial court in that regard.

In the premises, the appeal of the appellant bank fails with the result that it is hereby dismissed with costs of the appeal to the 1st respondent.

JUDGEMENT DATED, SIGNED AND DELIVERED THROUGH E-MAIL ADDRESSES OF COUNSEL FOR THE PARTIES AT KAPENGURIA THIS 14TH DAY OF APRIL 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Geoffrey Ngara - court assistant.