



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.73 OF 2019

BETWEEN

THE CO-OPERATIVE BANK OF KENYA LTD.APPELLANT

AND

RAPHAEL MIKWA SIKEYI.....1ST RESPONDENT

GORDON ODOYO SIKEYI.....2ND RESPONDENT

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's CMCC No. 11 of 2019 by Hon. L. Simiyu –Senior Resident Magistrate).

JUDGMENT

1. The appellant herein was the defendant in Homa Bay Chief Magistrate's CMCC No. 11 of 2019. The respondents had sued for specific performance, a declaration that the appellant acted contrary to banking practices, the release of motor vehicle KCP 775Z and for general damages. The learned trial magistrate delivered judgment dated 19th July, 2019 in favour of the respondents.

2. The appellant was aggrieved by the said judgment and filed this appeal. The appellant was represented by the firm of Ogejo Omboto & Kijala Advocates, LLP. The appellant raised four grounds of appeal:

a. That the learned trial magistrate erred both in fact and law by failing to appreciate that the appellant was entitled to repossess the subject motor vehicle when there was default or non-payment of the instalments as per the terms of the letter of offer.

b. That the learned trial magistrate erred in fact and law by awarding the 1st respondent damages of Kshs. 500,000.00 without considering the provisions of Regulation 35 of Credit Reference Bureau 2013 that succinctly provides for the procedure to be followed where one is aggrieved by wrongful listing.

c. That the learned magistrate erred in law and in fact by proceeding to award damages of Kshs. 500,000.00 on account of loss of business yet the same was not pleaded and no evidence was presented by the respondents.

d. That the learned magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and therefore arrived at a wrong decision.

3. The respondent was represented by the firm of G.S Okoth & Company, Advocates. It was contended that the appeal lacked merit.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The respondents and the appellant entered into a hire purchase finance facility in respect of the motor vehicle in issue. The appellant was to finance the purchase while the respondents were to remit periodical payments.

6. It would appear that payments were not forthcoming as expected. The appellant made several demands and on 29th January 2019 a 3rd demand letter was sent to the respondents. The letter was calling for the payment of the outstanding balance within seven days. The appellant dissatisfied, instructed auctioneers to repossess motor KCP 775Z and sell it to recover an outstanding balance of Kshs.799, 809.40.

7. Both parties exhibited statements in respect of some bank accounts that were key to this case. One such account is the executive current account number: 011xxxxxxxxxxxxx in the name of Raphael Mikwa Sikeyi. As at 7th January, 2019 it had a debit balance of Kshs.799, 801.40. The other account is Retail Asset Finance-P/Loan number 016xxxxxxxxxxxxx. As at 31st January, 2019 it had a debit balance of Kshs. 3,819,869.57.

8. At the time of repossession of the KCP 775Z, the appellant had written several demand letters. The two accounts were overdrawn. This contradicted the respondents' averment that they did not owe the appellant any arrears. Their own documents contradicted their contention.

9. In his statement, Raphael Mikwa Sikeyi, the first respondent contended that prior to the attachment of the said motor vehicle, the appellant did not inform him of the activities leading to the attachment. This was again contradicted by demand letters dated 30th November, 2018, 11th December, 2018, 14th December, 2018, 17th January 2019 and 28 January, 2019 which he received and signed for.

10. By a letter dated 29th January, 2019, the first plaintiff was notified of the intention to pre-list him with the Credit Reference Bureau. He cannot be heard to argue that the appellant was prompted by malice.

11. Banks and other financial institutions do not offer overdraft facilities to their customers unless the same has been applied for. Though he denied asking the bank to extend the overdraft facility, one wonders why the bank bothered to call Raphael Mikwa Sikeyi to inform him his account had no funds to honour the cheque for Kshs.799, 801.40 if it had intended to unilaterally give him an overdraft. He must have asked for the facility as contended by the appellant. It was erroneous for the learned trial magistrate to make a finding that the payment of the cheque No. 000197 on 29th January, 2019 was malicious and calculated to disparage the respondents and their business.

12. Awarding damages to the respondents was tantamount to awarding them for defaulting in repayment of the loan advanced to them.

13. From the foregoing, it is abundantly clear that the learned trial magistrate did not arrive at a decision which was supported by evidence. I accordingly set aside the judgment and decree of the trial court. The appeal is therefore allowed with costs in this court and the trial court.

DELIVERED and SIGNED at HOMA BAY this 21st day of July, 2021

KIARIE WAWERU KIARIE

JUDGE