



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 224 OF 2018

MAIMUNA HASSAN YUSUF.....APPELLANT

-VERSUS-

CHARITY MNYAZI MWARUMBA.....RESPONDENT

(Being an appeal against the ruling and or order of the Learned Magistrate Honourable J.Kassam, Senior Resident Magistrate, delivered on 9th October, 2018 in MOMBASA CMCC. No.290 OF 2018, MAIMUNA HASSAN YUSUF VRS. CHARITY MNYAZI MWARRUMBA)

JUDGMENT

1. This is an appeal from the ruling of Mombasa Senior Resident Magistrate Honourable J. Kasam delivered on 9th October, 2018 in which the learned trial Magistrate struck out the Appellant's claim and directed the parties to refer the matter for arbitration as per the terms of sale agreement dated 30th June, 2016 executed by both the Appellant and the Respondent.

2. The genesis of this appeal is Chief Magistrate's Civil Case No. 290 of 2018 in which Maimuna Hassan Yussuf, as the Plaintiff vide a Plaint dated 16th February, 2018 and filed on the even date sued Charity Mnyazi Mwarumba as the defendant. 3. The facts stated in the plaint appear straight forward. It is averred therein that on 30th June, 2016, the parties entered into a sale agreement wherein the plaintiff agreed to sell to the Defendant her property known as Sub-Division No.4622(Original No.4601/22) Section II/MN at a consideration of Kshs.7,000,000/= subject to the Law Society of Kenya Conditions of sale (1989 Edition).

It was expressly agreed therein that the Defendant would pay an initial deposit of Kshs.4,000,000/= then pay a further deposit of Kshs.2,000,000/= within 30days from the date of execution of the sale agreement. The remaining balance of Kshs.1,000,000/= would then be paid directly to the Plaintiff on or before 31st of May, 2017. The time of completion was of essence in the event of default in payment of the purchase price, the interest rate payable was indicated as 24% P.a.

3. The Plaintiff then acknowledged that the Defendant had paid a total of Kshs.5,900,000/= and a balance of Kshs.1,100,000/= remains unpaid to date. Her claim was therefore for Judgment against the Defendant for the Balance of Kshs.1,100,000/=, costs of the suit and Interest on the agreed rate of 24% p.a from 31st May, 2018.

4. Through her Advocates, Mulwa Nduya & Co Advocates, the Defendant filed her defence on 3rd April, 2018 which was later amended on 20th June, 2018. She admitted her indebtedness to the Plaintiff for Kshs.1,000,000.00 but not Kshs.1,100,000/- as claimed. According to her, the agreed interest rate was 10% p.a and not 24% p.a. She expressed her willingness to pay the owing balance by quarterly or monthly installments.

5. The suit was followed hot on its heels by the Appellant's Notice of Motion dated 20th March, 2018 seeking summary Judgment to be entered against the Defendant as prayed in the Plaint. The Respondent filed a Replying affidavit sworn on 4th June, 2018 in opposition of the Motion. She contended that the amount owing to the Appellant was Kshs.1,000,000/= as opposed to the Kshs.1,100,000/= claimed. She proposed to settle the amount due by quarterly instalments of Kshs.150,000/=. The Respondent also accused the Appellant for having altered the agreed interest rate by changing it from 10% to 24% after the sale agreement was duly executed. However, she averred that the sale agreement was very clear that any dispute arising between the parties in respect thereof should be referred to arbitration and therefore by filing the suit, the Appellant was in breach of the agreement. She sought the trial court to refer the matter for arbitration proceedings.

6. The notice of motion was heard by Honourable J.Kassam, who fastidiously went through the affidavits, submissions by both the parties and concluded that the matter was filed prematurely. The learned trial Magistrate referred the matter for arbitration after striking out both the Plaint and the Motion thereby giving rise to the present appeal which is predicated on some nine grounds of appeal to wit:-

a) The learned trial Magistrate erred in law and in fact in striking out the Plaintiff's suit in absence of any specific application to that regard or an objection to the Honourable Court's Jurisdiction.

b) The learned trial Magistrate erred in law and in fact in striking out the Appellant's application for summary Judgment by way of Notice of Motion dated 20th March, 2018 on the face of a finding of a clear admission of liability by the Respondent.

c) The learned trial Magistrate erred in law and in fact in striking out the Plaintiff's application for summary Judgment against overriding evidence and without sufficient reasons, thus rewriting the contract between the parties, driving the Appellant from the seat of Justice and denying the Appellant the Summary procedure of recovery, contemplated by clause 6.2 of the sale agreement dated 30th July, 2016.

d) The learned trial Magistrate erred in law and in fact in failing to find in favour of the Appellant and allow the Appellant's Application for summary judgment as prayed in the face of overwhelming evidence and written submissions in favour of the Appellant.

e) The learned trial Magistrate erred in law and in fact in failing to find that once liability for non-payment of Kshs.1,100,000/= was admitted and the Honourable court's jurisdiction was also admitted by the defence, the Honourable court would be abdicating its judicial authority by declining to award the claim to the Appellant and instead referring the same for arbitration.

f) The learned trial Magistrate erred in law and in fact in failing to consider that the parties had contemplated by agreement that the disputes relating to non-payment of the balance of the purchase price be referred to the Honourable court for hearing and determination.

g) The learned trial Magistrate erred in law and in fact in fact in referring this matter for arbitration as per clause 23 of the sale agreement whereas Clause 6.2 of the same agreement vests jurisdiction before the Court and the Respondent had filed a defence acquiescing to the Jurisdiction of the Honourable Court.

h) The learned trial Magistrate erred in law and in fact in referring this matter for arbitration after striking out the suit, hence acting in excess of its jurisdiction or exercising its jurisdiction contrary to the law.

i) The learned trial magistrate erred in law and in fact in failing to exercise her discretion or at all and or exercising her discretion in the wrong manner and or failing to follow the correct principles of law and or precedents cited in exercise of her discretion and hence struck out the Appellant's suit as well as the motion for summary judgment dated 20/3/2018.

7. The appeal came up for hearing on 23rd July, 2019 with Mr. Njoroge appearing for the Appellant whilst Ms. Njau appeared for the Respondent. It was agreed by consent of the said advocates that written submissions be filed after which the appeal was listed for further hearing on 18th November, 2019 when counsels for the parties would highlight their respective written submissions.

8. On 18th November, 2019 the court reconvened and counsel informed the court that they would go by their written submissions. Judgment was set for 30th January, 2020 but unfortunately the court was not sitting. Nonetheless the submissions by both parties are as follows.

Appellant's Submissions

9. The Appellant's submissions begin with reiterating the chronology of events since the filing of the suit before the lower court to the date when this appeal was filed. It is however submitted that the trial court had no powers to refer the parties for arbitration having struck out the suit because it became *functus officio*. That as per Section 6 of the Arbitration Act, Cap 49 laws of Kenya, the trial court only had powers to stay the proceedings and refer the matter for arbitration or in the alternative dismiss the plea and proceed with the hearing. In addition, it is submitted that the trial court can only stay the proceedings if a party so applies and not *suo motto* as in the instant case. The appellant is of the view that the court should have stayed the proceedings and not dismissed the same while referring a matter for arbitration because parties are supposed to come back to record the results of the arbitration and pursue enforcement ,if need be. It is therefore argued that the trial court acted in excess of its jurisdiction. To buttress this line of argument, reliance is placed on the case of **Benjamin Leonard Macfay –vs-United Africa Company Limited [1961] 3 All E.R 1169**.

10. The Appellant submits that the trial magistrate wrongly interpreted the provisions of clause 6.2 of the sale agreement by referring the matter for arbitration. By the said clause it is argued that parties had expressly agreed that any claims contemplated for recovery of the balance of the purchase price of Kshs.1,000,000/- would be in summary manner before the court of law notwithstanding the arbitration clause. The trial court is thus said to have erred by not addressing the effects of Clause 6.2 of the Sale Agreement.

11. It is further submitted that the Respondent had acquiesced the jurisdiction of the trial court and by filing the statement of defence, she lost her right to rely on the arbitration clause. This argument was buttressed by excerpts from the cases of **Kenya Commercial Bank –vs- Suntra Investment Bank Ltd [2015] eKLR** and **Corporate Insurance Company –vs- Loise Wanjiru Wachira [1996] eKLR**.

12. The Appellant submits that the defence filed by the respondent does not raise any triable issues because the Respondent admits the debt of Kshs.1,100,000/= hence the matter is eligible for summary judgment against the Respondent. Lastly, it is submitted that clause 16 of the sale agreement states that interest rate would be 24% p.a. It is argued that at all times the Respondent was represented by an advocate who also witnessed the execution of the agreement hence her arguments that the interest rate was changed cannot hold water. The Appellant sought this court to uphold the appeal and set the lower court ruling aside by substituting it with an order allowing her application for summary judgment.

Respondent's Submission

13. The Respondent submits that the matter had not proceeded for trial and therefore both the claim of Kshs.1,100,000/= and the interest rate

remain disputed. It is argued that these are triable issues and summary judgment should only be granted in the clearest of cases where there is no bona fide defence. It is argued that Prayer No. (b) on the Memorandum of Appeal cannot be granted because the Respondent has sworn that the Defence has triable issues. On this line of defence, reliance is placed on the cases of *Isaac Awuondo-vs-Surgipharm Ltd & another Civil Appeal No. 134 of 2003 [2001] eKLR* and *Ternic Enterprises Ltd-vs-Waterfront Outlets Ltd [2018] eKLR*.

14. The Respondent thus submitted that if the appeal is allowed it will violate her rights for fair trial because the defence filed raises triable issues and this court ought to dismiss the appeal on that ground.

Analysis and Determination

15. This is a first appeal. It is the duty of a first appellate court to evaluate afresh the evidence that was adduced at the lower court and draw its own conclusions albeit always bearing in mind that it neither saw nor heard the witnesses and should therefore make due allowance in that respect (see the case of **Selle & Another Vs Associated Motor Boat Co. Limited & Others (1968) EA 123**).

16. It is also the position of the law that an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial court is shown, demonstrably, to have acted on wrong principles in reaching its findings (See A.R.W. Hanox **JA in Ephantus Mwangi & another Vs Duncan Wambugu (1983) 2 KCA 100** (also reported in (1982=88)

17. After a scrupulous probe of the contenting parties respective positions and having taken into account Learned Counsels' submissions and the authorities cited therein, I am of the considered view that the substantive issues for determination in the instant application are;

- a) Whether the trial magistrate misinterpreted the terms of the sale agreement by referring the matter for arbitration.
- b) Whether the Appellant's application to dismiss the defence was merited
- c) Who should bear the costs

18. The lower court struck out the Appellant's suit on the strength that the same is founded on a subject of arbitration must be referred to arbitration. I note that no application had been made by the either of parties to stay proceedings and refer the matter to arbitration. However the learned trial magistrate observed that by filing the suit and the subject motion for dismissing the defence, the Appellant was in abuse of court process and the court would be rewriting the contract between the parties in making any decision thereof.

19. I will begin by considering Section 10 of the Arbitration Act which provides that "except as provided in this Act, no Court shall intervene in matters Governed by the Act." This section will have to be read together with Section 6 of the Arbitration Act in order to provide unassailable perspective of the law on this matter. The section provides;

"A Court before which proceedings are brought in a matter which is subject of an Arbitration agreement shall, if a party so applies not later than the time when the party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to the arbitration unless it finds:-

- a. **that the arbitration agreement is null and void, inoperative or incapable of being performed; or**
- b. **that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration**

20. In the case of **LOFTY v BEDOUIN ENTERPRISES LTD – EALR (2005) 2 EA**; the Court of Appeal was categorical that;

We respectfully agree with these views, so that even if the conditions set out in paragraphs (a) and (b) of Section 6 (1) are satisfied the Court would still be entitled to reject an application for stay of proceedings and referral thereof to Arbitration, if the application to do so is not made at the time of entering an appearance or if no appearance is entered, at the time of filing any pleadings or at the time of taking any step in the proceedings. [Underlining mine]

21. The rationale of the decision in the Lofty case is that an arbitration clause ought to be invoked when the Applicant enters appearance and not after the Applicant has taken any other step like filing of pleadings. The object of Section 6(1) is therefore to ensure that applications for stay of proceedings are made at the earliest state of the proceedings.

22. On the foregoing, I should restate, however, that an arbitration clause does not necessarily take away a party's right of action in court to enforce his claim. It is also true that an arbitration clause may be nothing more than a collateral term of the contract between the parties by which a tribunal for determining disputes is provided. The question to ponder however is whether a court of law which assumes jurisdiction on a case in accordance with Section 6 of the Arbitration Act will in any way have violated the Act or Article 159 of the Constitution which places the court under duty to promote Alternative Forms of Dispute Resolution. I do not think so. Section 6 is part of the Arbitration Act and enjoys a rebuttable presumption of constitutionality. More importantly, the section guards against delay, serves the overriding objective and the principles of justice in Article 159 of the Constitution by ensuring that applications for referral of the dispute in question to arbitration are made promptly. Therefore, whoever does not apply within the parameters set out in Section 6 of the Arbitration Act offends the law and the Constitution, and will be deemed to have forfeited his right to rely on the arbitration agreement. I am, however, well aware that, despite violation of Section 6 of the Arbitration Act, the court could still refer the dispute to arbitration but only with the consent of all the parties. The bottom line is that each case should be decided on its own facts and circumstances. (see the case of **Midroc Water Drilling Co. Ltd v National Water Conservation & Pipeline Corporation [2015] eKLR**)

23. I agree with the decision in the case of **Martin Otieno Okwach & Charles Ong'ondo Were T/A Victoria Cleaning Services vs Kenya Post Office Savings Bank [2014] eKLR**, where the court held that;

“Although there was a dispute that was capable of being determined, the same could not be referred to arbitration as the court was now seized of the matter, the Defendant having duly filed its statement of defence in this matter..”

24. Weighing the discussions above with facts of the instant suit, this court finds that the Respondent had not only failed to make an application seeking stay and referral of the matter to arbitration but also that she filed a statement of defence on 3/4/2018 which was later amended on 20/06/2018. The Respondent had also filed a replying affidavit sworn on 4th June, 2018 opposing the Application, the subject matter of this appeal. On chronology of those events, it is my view that the trial court was seized of the matter and could legally proceed to determine the issues in dispute without circumventing the Arbitration Act as well as Article 159 of the Constitution. Unless the parties consented to have the matter referred to arbitration under Order 46 Rule 1 of the Civil Procedure Rules 2010, they are firmly stuck in the court system.

25. In addition to the foregoing, I find that under clause 6.2 of the sale agreement, parties had agreed to overlook the arbitration clause and pursue a civil claim before the courts in the event that the Respondent as at 31/5/2017 defaulted in payment of Kshs.1000,000/= being the purchase price balance. It cannot go without saying that the trial court was therefore seized with Jurisdiction to determine the bone contention of the suit filed before it, there having been a default in payment of the balance of Kshs.1000,000/=. More often than not the Respondent did not denying being in default of the balance price as stated in Clause 6.2 of the agreement. I find that the trial magistrate wrongly exercised her jurisdiction in referring the matter for arbitration.

25. I now turn to the second issue which is whether the Appellant's application dated 20th March 2018 was merited. The said application was asking the court to primarily enter judgment against the Respondent as sought in the Plaint. Having checked the Plaint, I note that it sought for Judgment against the Defendant for Kshs.1,100,000/=, interests at agreed rate of 24% p.a and costs of the suit. It was averred that the Defendant had failed to file a statement of defence.

26. However the Defendant filed a statement of defence on 3rd April, 2018. In her defence, the Respondent conceded to being in arrears of Kshs.1,000,000/= but not Kshs.1,100,000/= as sought by the Appellant. She averred that her intent was to settle the amount due at reasonable monthly rate owing to tough financial situations. It was her further line of defence that the agreed interest rate was 10% p.a but the Appellant had changed the quotation to 24% p.a. She opposed the application on the basis that the defence raises triable issue.

27. The primary applicable law concerning summary judgment is found in Article 159 (2) (c) of the Constitution which enacts that:

In the exercise of judicial authority, the courts shall ensure that justice is done without undue delay. Thus, a matter that ought to be determined expeditiously ought not to be archived in court.

28. In addition, under Section 63 (e) of the Civil procedure Act, the court may, in order to prevent the ends of justice from being defeated make such interlocutory orders as may appear to the court to be just and convenient. Further, Sections 1A and 1B of the Civil Procedure Act also oblige this court to ensure just, fair, proportionate and expeditious administration of justice to the parties before it.

29. The procedural law under Order 36 rule 1 of the Civil Procedure Rules on summary judgment in a summary provides that a court will grant the plaintiff summary judgment where the claim is of a liquidated demand with or without interest or recovery of land where the defendant has entered appearance but not filed a defence.

30. The Court of Appeal stated in the case of **ICDC VS DABER ENTERPRISES LTD (2000) 1 EA 75** that:

“The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plainly and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross examination.”

31. Regarding what constitutes triable issues, in the case of **KENYA TRADE COMBINE LTD V SHAH, Civil Appeal No. 193 of 1999**, the Court of Appeal stated as follows:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”(emphasis mine).

32. Where bona fide triable issues have been disclosed, the Court has no discretion to exercise in regard to the defendant's right to defend the suit. Whereas, if there are no triable issues disclosed, the court cannot sustain a defence on record, it ought to be dismissed.

33. In the instant case, it is not disputed that the defendant has filed a statement of defence. In that defense, the defendant has admitted being in default of payment of Kshs.1000,000/= owing to the Appellant but proposed to settle the same in monthly instalments. On the face of the statement of defence, what is disputed is whether the extra amount of Kshs.100,000/= as Claimed by the Appellant is payable by the Respondent and whether the interest chargeable was agreed at 10% p.a as alleged by the Respondent or 24% p.a as claimed by the Appellant.

34. I must hasten to add that summary judgment may actually be entered on part only of the total amount claimed. I am unable to identify

what else is to be tried as far as amount of Kshs.100,000/= is conceded by the Respondent as being the only amount due to the Plaintiff. It is plain and obvious that the Defendant will not contest this amount. The Claim by the Respondent that the interest rates were altered with, in my view may also not hold much sway. It may not be said that the reconciled amount of Ksh.1000,000/= is the only amount due. Rather, the court should not shy away from allowing summary judgment on the reconciled amount of Kshs.1000,000/= and let any contested balance and chargeable interest thereof proceed to trial.

35. In the result and pursuant to the provisions of Order 36 Rule 1 of the Civil Procedure Rules, I am inclined to enter summary judgment for the Plaintiff on a portion of the claim being the sum of Kshs.1,000,000/= and the balance of the claim to proceed on trial. There is no defence to this amount. The totality of the circumstances and facts dictate so.

36. The upshot is that the appeal is merited and the following orders issue: -

a) *The Appeal is allowed.*

b) *The Judgment of the Lower Court striking out the Appellant's suit is set aside and is substituted with a Judgment in favour of the Appellant in the sum of Kshs.1,000,000/= together with interest.*

c) *Parties to proceed for trial on the contested issues before the lower court.*

d) *The Appellant to fix a mention date before the lower court for further directions.*

e) *As regards Costs on Appeal, each party to bear its own costs.*

It is so ordered.

Dated, Signed and Delivered this 19th day of May, 2020.

D.O CHEPKWONY

JUDGE.

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes