



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL APPEAL NO. 312 OF 2004

NATIONAL HOUSING CORPORATION.....APPELLANT

-VERSUS-

FRANCIS MUGA.....RESPONDENT

(Being an appeal from the judgment and order in RMCC No. 6085 of 1999

of T.W.C. Wamae Senior Resident Magistrates on 8th April 2004)

J U D G M E N T

1. **National Housing Corporation** is the Appellant herein. It is a statutory corporation established under the provisions of the Housing Act Cap 117. The Respondent, **Francis Muga** is an adult male.

2. The Appellant filed a case before the Chief Magistrate's Court Milimani Nairobi, Civil Case No. 6085 of 1999, against the Respondent. By that case the Appellant sought judgment, against the Respondent, for Kshs. 106,267.00 being balance of a loan advanced to the Respondent.

3. The case proceeded for hearing on 25th February 2004 when the Plaintiff's witness testified and was cross-examined by the Respondents Advocate. The case was adjourned on that day, for defence hearing on 29th March 2004. On that day the Respondent failed to attend Court and the defence was closed.

4. The Learned Trial Magistrate delivered her judgment on 8th April 2004 whereby the Appellant's case was dismissed with costs to the Respondent. The Appellant was aggrieved by that judgment and has filed this appeal.

5. The Appellant filed the following grounds of appeal:

- i. The Learned Trial Magistrate erred in law in failing to appreciate the defendant had initiated third party proceedings confirming indebtedness.*
- ii. The Learned Trial Magistrate failed in law and fact to take into account the agreement executed by the Respondent and that half the amount was paid.*
- iii. The Learned Trial Magistrate failed in law to give reasons for her judgment.*
- iv. The Learned Trial Magistrate failed in law and in fact to appreciate that the case was not defended despite Counsel's presence at the cross-examination.*

6. I will proceed to consider grounds (i) and (iv) together and then consider grounds (ii) and (iii) together. Before considering those grounds let me give a brief background.

7. The Appellant granted the Respondent a loan of Kshs. 80,000. This is evidenced in the agreement between the parties dated 21st January 1988. That loan would attract interest at 8½ % p.a. The payments of that loan were by monthly installments of Kshs. 1,642. The first of such

installments was due and payable on 1st February 1988. The Respondent, by then, was an employee the Kisumu County Council. It does seem that the Respondent arranged with his said employer for his installments to be deducted from his salary and remitted to the Appellant. There is evidence that some installments were made.

8. Ground of appeal (i) and (iv) call upon the Court to consider whether the Learned Trial Magistrate erred in not considering that the Respondent, by taking out third party proceedings admitted the debt, and whether the Trial Magistrate erred in not considering that the Respondent not having adduced oral evidence his defence was not advanced.

9. The Appellant very correctly submitted that the Respondent having failed to adduce evidence, in support of his defence, his defence remained mere allegations. This was clearly stated in the case **MARY NJERI MURIGI V PETER MACHARIA & ANOTHER [2016] eKLR** where the judge stated:

“Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail...” Where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged...”

10. The above holding in that case of **Mary Njeri (Supra)** is the position in law. The Learned Magistrate did not err in her considered judgment. At no time did the Trial Magistrate, in her judgment, take into account the Respondent’s unsubstantiated defence. Not all. The Appellant’s contention in that regard is rejected.

11. It was lost to me what the Appellant meant by the first ground of appeal when it argued that the Trial Court failed to consider that the defendant in taking third party proceedings admitted the debt.

12. It needs to be appreciated that the Respondent did not tender any evidence at the Trial. Similarly the third party, that is the Respondent’s employer, did not also participate in the Trial. With that in mind I find the ground of appeal (i) above to be misconceived. How could the Trial Court consider the taking of third party proceedings as an indication of admission of a debt? That ground is rejected for it lacks merit.

13. Grounds (ii) and (iii) faults the Learned Trial Magistrate for failing to take into consideration the loan agreement between the Appellant and the Respondent; for failing to take into account that half of the loan was paid; and for not giving reasons in the judgment.

14. The evidence on behalf of the Appellant, before the Trial Court was adduced by its employee, Charles Ndando. That witness stated that the Respondent was advanced a loan, by the Appellant, of Kshs. 80,000. The witness produced the loan agreement as an exhibit. That witness testified in chief as follows:

“The Plaintiff and defendant entered into an agreement. It’s dated 21/1/1988. Plaintiff Exhibit 1. The money was to be used to construct a house. The defendant complied. The terms of payment was Kshs. 1642 in which was inclusive of 8.5% interest per annum. Plaintiff was to pay the money to the Plaintiff by a check system from municipal council. We received 41,492 as the loan. The money was to be paid for a period of 5 years from 1.3.88 until 28.2.98 the defendant did not pay any other money. We wrote demand letters defendant (sic), Plaintiff exhibit 2(a), (b) and (c). Defendant wrote in reply dated 7/6/99. He said he had fully paid that loan and had already retired from public service Plaintiff Exhibit 3. The Plaintiff owes us Kshs. 106,267 as at the time of filing suit.

Plaintiff (sic) presently owes us 213,735. The money was to be remitted to us by defendant’s employer. We had no agreement with the employer. It was an agreement between Defendant and his employer. We ask for judgment in the sum prayed for and interest at Court rates with costs of this suit.

Defendant employer wrote a letter saying it was forwarding a cheque to us. We however did not receive the cheque.”

15. On being cross-examined, the Appellant witness stated that the Appellant received, from the Respondent’s employer cheques for Kshs. 22,088, Kshs. 11,942, Kshs. 17,894 (which included the cheque of Kshs. 11,942) and Kshs. 4,920. Whereas the witness gave dates of receipt of two of those payments for the others he did not.

16. That is the sum total of the evidence the Trial Magistrate had to consider when delivering judgment.

17. The Trial Magistrate by her considered judgment found that the Appellant had failed to produce documents to support the amount claimed. The Learned Magistrate also noted that the Appellant’s witness at one time stated that the Respondent’s debt with the Appellant was Kshs. 106,267 and later stated that that debt was Kshs. 213,735. The Learned Magistrate proceeded to state in her judgment:

“The only evidence before the Court is oral evidence by Plaintiff (Appellant). I find that it was the duty of the Plaintiff to bring before Court sufficient material to support his (sic) claim. As much as there is no doubt that the Plaintiff lent money to the Defendant (Respondent) the sum arrived in the Plaint has not been justified. I find that this case has not been proved on a balance of probability and its dismissed with costs to defendant.”

18. The claim in the Plaint, before the Trial Court, simply stated:

“The Plaintiff’s claim against the defend is for Kshs. 106,267.00 as at 30th June 1998 being arrears of the loan advance to defendant by the Plaintiff in respect of Rural Housing Loan Account Number 12898 particulars whereof are within the defendants knowledge.”

19. When the Appellant witness testified at the Trial he exhibited the agreement and a few letters of the Respondent’s employer which letters forwarded some payments of the loan. When one looks at the prayer in the Plaint, reproduced above, it becomes clear that the Respondent had an account No. 12898 at the Appellant’s institution. The witness who testified did not produce such account statements. The Trial Court could not find the Respondent liable to pay a loan when there was no account statements before it proving the Respondent’s indebtedness. More so because the Appellant’s witness, when he testified gave two different amounts of the Respondent’s indebtedness. He said at one time that the Respondent owed the Appellant Kshs. 106,267 then said that the Respondent owed Kshs. 213,735. That evidence as it can clearly be seen was wholly unsatisfactory much more because the Appellant lacked account statements. It failed to meet the civil standard of proof, as correctly stated by Trial Court. The Appellant failed to meet the burden of proof in section 107 (1) of the evidence Act. That Section provides:

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

20. The Appellant failed to prove that the Respondent was indebted to it and if so how much.

21. This appeal is without merit. Since the Respondent did not all participate in this appeal no order shall be made on cost.

22. This appeal is hereby dismissed with no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 16TH day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

..... **FOR THE APPELLANT**

.....**FOR THE RESPONDENT**