



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 154 OF 2015

PAUL KIBUGI MUIITE.....1ST APPELLANT

EDITH NDETI MUIITE..... 2ND APPELLANT

- V E R S U S -

NATIONAL BANK OF KENYA LIMITEDRESPONDENT

(Being an appeal from the entire decision and judgment and order of Hon. T. Wamae delivered on the 27th July 2013 and the deacon of the Hon. T. Ngugi made on 26th May 2014 in Nairobi Chief Magistrates Court in Civil Case No. 572 of 2013)

JUDGEMENT

- 1) By the Further Amended Plaintiff dated 29th June 2010, National Bank of Kenya Ltd, the respondent herein sought for judgment in the sum of ksh.1,440,858/30 plus interest at 23%p.a against Paul Kibugi Muite and Edith Ndeti Muite, the 1st and 2nd appellants respectively. The aforesaid amount is said to have arisen on an alleged visa card and supplementary visa cards issued to the appellants.
- 2) By their defence filed on 1st October 2003, the appellants contested the respondent's claim. The appellants denied the existence of the creditor/debtor relationship between them and the respondent giving rise to the alleged indebtedness to Kencard debit.
- 3) The suit which was before the trial Chief Magistrate's Court was set down for hearing on 5th June 2012. The record shows that parties appeared before Hon. T.W.C. Wamae, learned Chief Magistrate. On the aforesaid date, one Mr. Mituga appeared as holding brief for Mr. Kinyanjui learned advocate for the appellants and applied for an adjournment stating that Mr. Kinyanjui was held up in a 5 Judge bench hearing of JR 116 of 2012 and JR 23/2012. The record shows that the trial Chief Magistrate heard and declined to adjourn the hearing of the matter by noting that the date was fixed by consent.
- 4) The case proceeded for hearing as scheduled. Judgment was delivered in favour of the respondent and against the appellants on 27th July 2012. The appellants took out the motion dated 20th March 2014 in which they sought to have the aforesaid judgment set aside. Hon. T. Ngugi, learned Senior Principal Magistrate heard and dismissed the motion on 26th May 2014.
- 5) The appellants being dissatisfied by the dismissal order preferred this appeal and put forward the following grounds:
 - i. The learned trial magistrate erred in law and exercised her discretion wrongly when she dismissed the appellant's defence without considering any or all of the appellants' defence grounds which implicate the appellants' rights.***
 - ii. The learned trial magistrate erred in law and misdirected himself in law and in fact when she failed to consider that the defence by the appellants raised triable issue entitling them to be heard.***
 - iii. The learned trial magistrate erred in law and misdirected herself when she failed to consider that such a course was to condemn the appellants unheard, and a violation of the right to fairness and a fair trial under Article 25(c) of the Constitution, which was unlawful and therefore a breach of Article 10(2) of the Constitution.***
 - iv. The learned trial magistrate erred in law and in fact and exercised her discretion wrongly when she entered judgment against the appellants on 27th July 2013 without hearing the appellants in defence of their defence.***
 - v. The learned trial magistrate erred in law when she read mischief into the application for adjournment without considering the merits of the adjournment sought by the appellants' counsel and the basis of the application.***

vi. *The learned trial magistrate erred with respect when she entered judgment against the appellants and awarded interest at 23% per annum without justifying the said course of action.*

vii. *The learned trial magistrate ought to have accorded the appellants an opportunity to defend the suit.*

Appeal against the ruling of Hon. T. Nguni delivered on 26th May 2014 in Nairobi Chief Magistrates Court Civil Case No. 572 of 2003

viii. *The learned trial magistrate erred with respect when she dismissed the appellants' application dated 20th March 2014 without making a finding on whether the appellants had an arguable defence entitling them to defend the suit.*

ix. *The learned trial magistrate erred in law and seriously misdirected himself when she stated in his ruling that there was no material evidence before her of the appellants' keen interest in the prosecution of the suit when the evidence itself was contained in the witness statements and the defence.*

x. *The learned trial magistrate erred in law and seriously misdirected herself when she failed to accept the submissions of the appellants in asserting their application to set aside the judgment of 27th July 2013 based on the material before her, and disregarded the authorities cited to her by the appellants, thus showing her bias.*

xi. *The learned magistrate failed to take into cognizance the significance of affording the appellants their natural justice right to be heard before being condemned in court of justice and thereby she abrogated the appellants' right to access justice and enshrined in Article 48 of the Constitution.*

xii. *The learned trial magistrate erred in law and seriously misdirected herself when she failed to give weight to the appellants' objection in being made liable for a debt not lawfully apportionable to them without a proper hearing accorded to them and their objection at not being accorded the opportunity to ventilate their innocence or execution proceedings taken out against the appellants. The appellants were therefore shunted from the corridors of justice on the wrong exercise of the learned magistrate's discretion.*

xiii. *The learned magistrate failed to exercise her discretion properly in considering the appellants' application, and ignored all applicable principles of law and precedent in similar cases.*

xiv. *The learned trial magistrate erred in law and seriously misdirected herself when in law and in fact she failed to look into the proper merits of the said application, hence arrived at a wrong conclusion.*

xv. *She did not accord the appellants the opportunity to disprove the evidence tendered against them even on terms such as would meet the justice of the case.*

6) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. Though the appellants put forward a total of fifteen (15) grounds of appeal, the main issue or ground which commends itself for determination is whether the learned Senior Principal properly exercised her discretion in determining the motion dated 20th March 2014.

7) It is the submission of the appellant's that the learned Senior Principal Magistrate did not properly exercise her discretion when she failed to consider the merits of the appellants application thus improperly dismissing the application for setting aside the exparte proceedings. It is the submission of the respondent that the proceedings which gave rise to the judgment delivered against the appellants were not exparte therefore the motion which had sought to set aside the same could not have been used to set aside those proceedings. The respondent also pointed out that the advocate who held brief for Mr. Kinyanjui for the appellants did not turn up at the time allocated for the hearing of the suit hence the proceedings in the circumstances cannot be said to be exparte.

8) It is not in dispute that on 5th April 2012 the appellants' advocate sought for an adjournment on the basis that the instructing advocate was engaged in a hearing before a bench of 5 judges. The trial Chief Magistrate appears not to have considered the ground put forward in support of the application for adjournment. In fact the trial magistrate merely stated that the hearing date was fixed by consent and that the defendants were not present in court and proceeded to reject the application for adjournment.

9) The hearing of the suit was then fixed at 11.00am and that is when the advocate who held brief for Mr. Kinyanjui failed to turn up and the hearing proceeded in the absence of the appellants and their advocate. There is no evidence that the matter and the names of the appellants were called out. There is also no evidence that the appellants' case was closed. What happened is that the respondent's case was closed after which submissions were invited.

10) In the motion dated 20.3.2014, the appellants sought for the setting aside of the judgment delivered on 13.8.2013 and for leave to defend the suit. The learned Senior Principal Magistrate noted that the application was filed two years after the judgment was delivered. The trial magistrate also stated that the proceedings were not exparte and therefore the only recourse was either to appeal or apply for review. The question is whether the proceedings leading to the impugned judgment were exparte.

11) Having critically examined the recorded proceedings, it is apparent that it may after all be that the proceedings are exparte. The hearing of the case did not proceed immediately after the application for adjournment was refused. The trial court fixed the time for hearing at 11.00am. Come that time, neither the advocate who held brief for Mr. Kinyanjui nor the appellants turned up in court.

12) It is obvious that the advocate who held brief simply abandoned the matter without getting someone to inform the court the way forward. I am convinced that in the absence of the party and the advocate, it cannot be said that the hearing was interpartes. The motion dated 20.3.2014 should therefore have been determined on its merits rather than being dismissed for being incompetent.

13) The other issue which arose is the delay to being the application for setting aside. The learned Senior Principal Magistrate was of the opinion that the delay was inordinate. With respect, the learned Senior Principal Magistrate erred when she failed to take into consideration the appellants' assertion that they were unable to trace the court file for a long time. Therefore, though there was a considerable delay, the same has been explained hence excusable. With respect, I agree with the appellants submissions that in the circumstances of this case were entitled to a fair hearing which they were denied.

14) In the end and on the basis of the aforesaid grounds, this appeal is found to be meritorious. Consequently, the order dismissing the appellants application dated 20/3/2014 is set aside and is substituted with an order allowing the motion in terms of prayers 2 and 3. In the circumstances of this appeal, the respondent is entitled to thrown away costs assessed at ksh.30,000/=. The aforesaid amount to be paid to the respondent within a period of 21 days. In default the respondent shall be at liberty to execute for recovery. The suit to be heard on priority basis and in any case within the next 120 days failure to which the same shall stand automatically dismissed for want of prosecution.

Dated, Signed and Delivered in open court this 2nd day of May, 2019.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent