



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 34 OF 2015

SOSPETER KARIUKI NTHIGA NDORO.....APPELLANT

VERSUS

MARY NJERI NJIHIA.....1ST RESPONDENT

BENSON MURIITHI KIURA.....2ND RESPONDENT

THAYU SELF-HELP GROUP.....3RD RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant filed suit in the trial court seeking judgment against the respondents for Kshs. 153,810/=, costs of the suit plus interests being value of unlawfully attached items. Interlocutory judgment had been entered and execution commenced however the same was set aside and the matter heard on merit. In his judgment, the trial magistrate held that the appellant being the author of his own misfortune by failing to pay the loan which he had undertaken, had failed to prove his case on a balance of probabilities and thus dismissed the case with costs to the respondents.

2. The appellant being dissatisfied with the judgment of the Honourable trial magistrate delivered on the 29/07/2015 filed his memorandum of appeal dated 26/08/2015 which was based on grounds that can be summarised as follows;

a) The learned trial magistrate erred in law and fact when he dismissed the appellant's suit against the weight of evidence adduced by the appellant.

3. The parties filed submissions to dispose of the appeal.

B. Appellant's Submission

4. The appellant submitted that he had taken a loan from the National Council of Churches of Kenya through the 3rd respondent as guarantor of the loan. He further submitted that upon election as Secretary General of the 3rd respondent, he noticed some misappropriations of money and decided to pull out of the group.

5. The appellant further submitted that it was his intention to repay the loan and offset part of it using his shares when his loan became due. Further he submitted that he attempted to settle the same but it was rejected even after he approached the 1st respondent with Kshs. 3,050/= over and above his savings of Kshs. 3,850/=.

6. The appellant further submitted that the respondents failed to follow the right procedure by asking the appellant to surrender the properties he had pledged rather than taking the law in their hands and forcefully taking away the appellant's properties unlawfully.

7. The appellant further submitted that the respondents' actions were illegal as they had failed to give the appellant notice and failed to obtain a court order before attaching any of the appellant's properties and selling them. The appellant relied on the case of **Joseph Kamau Wangi v Kenya Commercial Bank Limited [2004] eKLR** which was cited in the case of **Samuel Kiarie Mungai v Housing Finance Co. Of Kenya Limited & Harold Tangai (HCCC No. 1678 of 2001)** where the court held that without service of a valid statutory notice the power of sale does not crystallize and any subsequent service of the notification and actual auction are a nullity in law.

8. The appellant further submitted that the actions of the respondents were illegal as the respondents were not licensed auctioneers and their actions were in contravention of section 9 of the Auctioneers Act and therefore criminal.

C. 1st Respondent's Submission

9. The 1st respondent submitted that the appellant had failed to provide sufficient evidence in support of his case as required by the law and further compounding this, his testimony was contradictory with that of the witnesses and could not be trusted at all. The 1st respondent cites the appellant's testimony at page 153 of the record where he admits that he was charged with a criminal offence of giving false information regarding his alleged stolen items.

10. The 1st respondent further submitted that the appellant did not challenge the evidence of the 2nd respondent regarding how much he owed and further how much was released after the sale of items.

11. The 1st respondent also submitted that the appellant's case was not one of infringement of constitutional rights as the appellant had willingly joined a registered group which had its by-laws on how to recover unpaid loans and was thus bound the terms and conditions and as such the appeal lacked merits.

D. 2nd Respondent's Submissions

12. The 2nd respondent submitted that having secured a loan of Kshs. 15,000/=, the appellant proceeded to secure the said loan in the pledge form No. 14806 which indicated that the items would be unconditionally sold to offset the same if he defaulted on the repayment and he be committed to civil jail if the amount due remains unrecovered.

13. The 2nd respondent further submitted that the appellant was to repay the loan in 26 weeks and he only made payment for 11 weeks totalling Kshs. 6,750/= by September 14th 1999 when he stopped paying leaving a balance of Kshs. 9,500/= which once his shares of Kshs. 3,650/= were deducted left an outstanding loan balance of Kshs. 6,900/=.

14. The 2nd respondent further submitted that as per the laws of the group, the members started paying the appellant's loan at an interest of 22% for 4 weeks. He further submitted that after a lot of struggle with the appellant, the group managed to attach some of the appellant's items and through the sub-chief gave the appellant 7 days to repay the loan which he failed to do.

15. The 2nd respondent further submitted that the appellant only made attempts to repay the loan after the respondents had already sold his attached items.

E. Analysis & Determination

16. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123; Makube v. Nyamiro [1983] KLR 403** and **Kiruga v Kiruga & Another [1988] KLR 348**.

17. It is trite that issues for determination in a suit generally flow from the pleadings unless the pleadings are amended in accordance with the Civil Procedure Rules. In order to determine the issues between the parties herein, one needs to look mainly at the memorandum of appeal. In my view the major issue upon which this appeal is founded is that the trial magistrate's judgment was not based on the weight of evidence adduced by the appellant.

18. It is the appellant's contention that the trial court disregarded his evidence and proceeded to dismiss his case. From the evidence and in cross-examination, the appellant does not dispute having a loan with the respondents and admits that he subsequently wanted to terminate membership to the 3rd respondent and pay the loan balance but the 1st respondent declined. He further states that the respondents later entered his home and confiscated some of his property all valued at Kshs. 153,810/= for sale to recover the loan.

19. Upon cross examination by the advocate of the 1st respondent, the appellant admitted that he only made efforts to repay the loan after his items had been sold to recover the loan.

20. The record reveals that the 1st respondent's testimony was that the appellant had secured a loan of Kshs. 15,000/= from the 3rd respondent guaranteed by other Thayu Self Help Group members of the 3rd respondent and provided some of his property as security subsequent to which the appellant defaulted in paying the loan whereby the members' contributions were deducted to cover the appellant's arrears.

21. Subsequently and after numerous reminders to the appellant to repay the loan, he did not comply. The members went to the appellant's residence and secured items pledged as security for the loan which were not enough to cover the amount owed. The members then in the company of the area Assistant Chief proceeded to take more items from the appellant's residence, specifically, an aerial and two water tanks of 50 and 200 litres respectively which were sold and the loan balance paid plus costs. The 1st respondent further denied the value of the goods as alleged by the appellant. The 1st respondent testimony was corroborated by the 2nd respondent.

22. I have carefully considered the record and the written submissions. From the record it is clear that the appellant willingly joined a registered group which had its by-laws on how to recover accrued unpaid loans.

23. The pledge form No. 14806 signed by the appellant specifically states that that the items pledged as security would be unconditionally

sold to offset the same if he defaulted on the repayment and he be committed to civil jail if the amount due remains unrecovered. It is important to note that the appellant could only be committed to civil jail through a court order, but not through the group by laws.

24. The position in law with regard to the binding nature of a contract executed willingly by the parties has now followed a well beaten path. In **National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR**, the Court was categorical that:

“it is clear beyond para adventure, that save for those special cases where equity might be prepared to re-leave a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

25. The Court in **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR**, after reviewing case law on the subject reiterated as follows:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

26. The appellant having signed the loan agreement and the pledge form was bound to honour them as a member of the self-help group. It was not in dispute that he was a member and was therefore bound by the by laws of the group. The minutes of the group for 30/06/1997 clearly indicated that every member was required to follow NCCCK Rules on payment and recovery of loans to which the appellant had submitted.

27. The pledge form indicated the items he had given as security of his loan and also stated that “any other property” would be attached should the value of the pledged items be insufficient to repay the loan.

28. The respondents explained in their evidence that the items pledged were not enough to secure the balance of the loan at the time of attachment which justified taking additional items. The appellant said the two bicycles were bought in 1994 and were of course old due to usage in 1999 when the respondents took them.

29. Following the attachment, it was clear that the 3rd respondent through its officials gave the appellant seven (7) days to clear the balance which he failed to do. This led to the disposal of his items already attached.

30. It was clearly explained by the respondents that anyone who wished to exit the group as the appellant said he attempted to do, was required to first clear his loan or any other outstanding dues. The appellant could not therefore pay Kshs. 3,050/= which was less than half of the outstanding loan and then exit the group. He ought to have cleared the whole amount owing to the group. The 3rd respondent was not bound to authorize the appellant’s exit until he complied with the group by laws. The shares of a member were to be refunded upon exit only if the loan had been cleared.

31. I have perused the judgment in light of the evidence on record. I find that the respondents evidence was credible and reliable on what transpired between the parties. The appellant did not dispute the amount he owed to the 3rd respondent and did not give any justification for his default.

32. The learned magistrate did not find the appellant and his witnesses credible. I agree with him that the appellant did not prove his case on the balance of probabilities. His contention that the judgment was against the weight of evidence is not supported by the record.

33. I find no merit in this appeal and it is hereby dismissed with costs to the respondents.

34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF SEPTEMBER 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms Wambui for Okwaro for Appellant

Ms. Ndegwa for Mogusu for 1st Respondent

Appellant present

1st Respondent present