



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 212 OF 2015

STANLEY MWANGI GACHUGU

BILHA WARUGURU MWANGI T/A VINCO FOOT WEAR PLAINTIFFS

- VERSUS -

BARCLAYS BANK OF KENYA LTD..... DEFENDANT

JUDGMENT

1. This is an undefended claim by **Stanley Mwangi Gachugu** and **Bilha Waruguru Mwangi** trading as Vinco Footwear. They have sued Barclays Bank of Kenya Limited, which although it filed its defence did not call any witnesses and did not therefore adduce evidence in support of its defence. That defence therefore remains mere allegation. This is the position in law and was restated in the case **Shaneebal Limited –v- County Government of Machakos (2018) eKLR**

“In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J.** citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

28. Similarly in the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J.** held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

29. If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where **Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.”

2. The plaintiff’s claim is made through Amended Plaintiff filed in court on **6th December, 2016**. The plaintiffs seek that the defendant be ordered to compensate them for their share certificates in various companies, that were deposited with the defendant as security for loans.

3. The plaintiff’s case was led by the evidence of **Stanley Mwangi Gachugu Stanley**. He stated that **Bilha Waruguru Mwangi** was his wife. They trade under the business name of Vinco Foot Wear. At the material time they operated a current business account with the defendant at its Moi Avenue Branch. Through that account they obtained overdraft facilities in 1990 and 1991. As security for those facilities they deposited with the defendant share certificates and title deeds. In respect to the share certificates they signed blank transfer forms which were left in the custody of the defendant. Those share certificate were as follows:

a. 1926 + 385 Kenya Breweries Ltd

b. 373 Brooke Bond Kenya Ltd

- c. 532 +63 E.A.P. & L. Company Ltd
- d. 4,2834 +31257 ICDC Investments Co.Ltd
- e. 700 Standard Chartered Bank
- f. 5,500 Kenya Finance Corporation
- g. 4,410 Rift Valley Bottlers Ltd (unquoted)
- h. 700 ICDC Shares
- i. 1,560 B.A.T (K) Ltd
- j. 1,250 Shares
- k. 1,150 Barclays Bank Shares
- l. 100 Barclays Bank Shares
- m. 2,500 KFC Shares
- n. 4,000 KFC Shares
- o. 28557 Shares for ICDC

4. It is the Plaintiffs' case that the overdraft facility was fully paid off. The plaintiffs did not however request for the release of their share certificates or titles because, as stated by Stanley, the same were safe at the bank and they were contemplating using those securities later to obtain further facility from the bank.

5. Stanley stated that in 1998 they realised that they were not receiving dividends for their shares. He went to the defendant but he was surprised to be informed that the bank only had in its custody one share certificate of NIC Bank and two title deeds.

6. Stanley stated that for the following 4 years the bank failed to inform him of the whereabouts of their share certificates. This is how he put it:

“Thereafter for about 4 years, the bank tossed me left, right and center and I did not make any headway regarding our shares.”

7. On carrying out his investigation he found out that the defendant had fraudulently sold their shares. He was able to obtain share transfer forms in respect to their shares of ICDC Bank and Diamond Trust Bank.

8. On requesting for bank statements, the defendant only supplied statements for January to September 1993. The bank did, on request, supply a letter dated 3rd April 2013 which confirmed that the plaintiff did not have any outstanding liability with the defendant.

9. On further investigation Stanley obtained a letter from Diamond Trust Bank, dated 30th March 2015, which stated that his shares which had been deposited with Barclays Bank had been sold.

10. Stanley lodged a complaint with the capital Market Authority and that authority communicated with the defendant. The defendant responded by stating that it did not have record of the plaintiffs' shares because they had been destroyed after the lapse of 7 years period.

11. Stanley stated that he did not go for his shares, once the facility was paid, because he and his wife had not bought the shares for speculative purposes but rather they were for investment for their old age. He also stated that he and his wife started their businesses in 1958 when they raised their capital of Ksh 10/=. With that they began roasting and boiling meat in Kisumu, at a verandah and their other businesses grew from that humble beginning. He stated the fraudulent act of the defendant had left them destitute and he was unable to provide medical care for his wife who was sick.

12. Stanley was of the view that the defendant was not honest or truthful when it said it did not retain documents for more than 7 years yet it had given him bank statements, share certificate of NIC Bank and two title deeds. He then posed a rhetorical question of when the 7 years period, the defendant was referring to, began to run.

13. On being cross examined Stanley stated that he did not take note of how many shares he handed over to the defendant but that he was requested to sign blank transfer for them. He also stated that the defendant debited money from his account for payment of the loan facility.

ANALYSIS AND DETERMINATION

14. The defendant, through its written submissions, has stated that the plaintiff's case is time barred. The defendant argued that the defendant presented the letters of offer for overdraft facility and that those letters amounted to an offer in contract and its acceptance by the plaintiffs made it into a binding contract.

15. There was no response from the plaintiff in this regard.

16. In my judgment the defendant has erred in that submission. The plaintiffs' case, as I understand it, is that the defendant fraudulently sold or lost their share certificates and they seek compensation. The plaintiffs' case is therefore based on a claim in fraud.

17. The plaintiffs' evidence is that it was in 1998 that they discovered their dividends payments were reduced. Stanley began to make his inquiries but he said the defendant "tossed him right left and center". One gets an idea that Stanley struggled to get information about the share certificates. This investigation continued until 2011, when he requested the defendant for bank statements, to 2012 when he requested the defendant to confirm they had no liability with it.

18. It would follow that section 26 of the Limitation of Action Act is applicable in determining if whether the period of Limitation had caught up with the plaintiffs. Section 26 of the Limitation of Action Act Cap 22 provides:

Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

19. In the case **Tecla Cherono Sirma –v- Peter Kiplangat Kimetto & Another (2018) eKLR** the court had this to say of Section 26:

In the case of *Ishmael Ithongo v Geoffrey Ithongo Thindiu [1981] eKLR* the appellate court stated as follows:

“Section 26 of the Act states that where, in case of an action for which a period of limitation is prescribed, the action is based on the fraud of the defendant or his agent, or the right of action is concealed by the fraud of any such person, the period of limitation does not begin to run until the plaintiff has discovered the fraud.”

20. The plaintiffs have proved their case on higher standard than balance of probability. The plaintiffs provided letters of offer dated 20th November 1990 and 24th October 1991, issued by the defendant. In both those letters the defendant offered the plaintiffs overdraft facility and then set out, therein, the security documents it required the plaintiffs to provide. In that list is all the share certificates which are the subject of this present claim. The plaintiffs through the evidence of Stanley stated that the defendant required signed blank transfer form from the plaintiffs, which were provided.

21. There is no evidence before court of the plaintiffs' default in repayment of their loan. It follows that there was no basis for the defendant to sell the share certificates they held as security for the loan facilities. Yet from page 10 to 30 of the plaintiffs' documents before court there is evidence of selling some of the plaintiffs' share certificate. The defendant cannot feign ignorance of those sales because its stamps appear on the share transfer forms on those pages.

22. Without having offered evidence and the court only having received the plaintiffs' evidence the court is of the view that the plaintiffs' case is proved to the required standard.

23. The standard of proof in fraud was considered in the case **KURIA KIARIE & 2 OTHERS V SAMMY MAGERA [2018] eKLR**

25. The next and only other issue is fraud. The law is clear and we take it from the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See **Order 2 Rule 4 of the Civil Procedure Rules**.

26. As regards the standard of proof, this Court in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of

forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases... "...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

24. The plaintiffs by their amended plaint seek judgment for compensation at prevailing market value for the share certificate which were left in the custody of the defendant. The prevailing market value can only be the value at the Nairobi stock exchange. That evidence of market value was not presented before court. It follows that having found that the defendants were fraudulent in selling the plaintiffs' share certificate I will proceed to issue a preliminary decree which will be made final when the plaintiffs provide evidence of the prevailing market value of their shares, which are the subject of this suit.

25. The granting of preliminary decree is in conformity with Order 21 Rule 16 of the Civil Procedure Rules, 2010, which provides:

"In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit"

26. The court of appeal when considering comparative authorities on preliminary decree in the case of **ALBA PETROLEUM –V- TOTAL MARKETING KENYA LIMITED** [2019] eKLR stated:

"Comparatively, the Supreme Court of India in **Shankar vs. Chandrakant**, AIR 1995 SC 1211 defined a preliminary decree as follows:

"A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of."

27. The plaintiffs having succeeded in their claim will be awarded costs of the suit.

28. Judgment is hereby entered, and a preliminary decree shall issue in the following terms:

a. The defendant shall compensate the plaintiff for their share certificates fraudulently sold by the defendant which compensation shall be at the prevailing current market value of those shares. The plaintiff shall provide evidence of the current prevailing market value of the shares at a date which shall be fixed by the court.

b. The plaintiff is awarded costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day OCTOBER, 2019.

MARY KASANGO

JUDGE

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

Sophie.....**COURT ASSISTANT**

..... **FOR THE PLAINTIFFS**

..... **FOR THE DEFENDANT**