



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO.30 OF 2017

JUSTIN GITONGA.....APPELLANT

VERSUS

FAULU MICROFINANCE BANK LIMITED.....1ST RESPONDENT

EARNEST NJOROGI T/A MWANGI AUCTIONEERS....2ND RESPONDENT

J U D G E M E N T

A. Introduction

1. This appeal is against the judgement and decree in **Embu CMCC No. 197 of 2014** on the 27.6.2017.

2. The appellant sued the respondents vide amended plaint dated 3.10.2016 for unlawful attachment of his vehicle. The 1st respondents failed to put in a defence and the matter proceeded for formal proof. The case was fixed for formal proof on 24.4.2017 after which the appellant filed submissions. Judgement was delivered on the 27.6.2017 whereby the trial court dismissed the appellant's case with costs.

3. The appellant being aggrieved by the decision preferred this appeal on the following grounds: -

- 1) The learned trial magistrate erred in law and fact in revisiting the issue of liability while there was an interlocutory judgement against the 1st respondent.***
- 2) The learned trial magistrate erred in law and in fact in failing to assess damages.***
- 3) The learned trial magistrate erred in law and in fact in considering the defence of the 1st respondent which was not properly on record.***
- 4) The learned trial magistrate erred in law and in fact in considering matters that he should not have considered and failing to consider matters that he should have considered.***
- 5) The learned trial magistrate erred in law and in fact in finding that the appellant had not proved his case on a balance of probabilities.***
- 6) The learned trial magistrate erred in law and in fact in awarding costs to the defendant in an undefended case.***
- 7) The learned trial magistrate erred in law and in fact in dismissing the appellant's case while there was judgement in his favour on the issue of liability.***
- 8) The learned trial magistrate erred in law and in fact in failing to consider the witness statements, documents and pleadings filed by the plaintiff.***
- 9) The learned trial magistrate erred in law and in fact for failing to determine all the issues for determination.***
- 10) The entire judgement is flawed and is against the weight of the evidence and the principles guiding the writing of judgement and the conduct of a formal proof.***

11) The learned trial magistrate erred in going against the directions he had given on the mode of conducting formal proof.

B. Appellant's Submissions

4. On Grounds 1,2 & 7, the appellant submitted that the trial court was at fault for revisiting the issue of liability and failing to assess damages. Counsel for the appellant submitted that once interlocutory judgement had been entered, the court could not revisit the issue of liability and could only assess damages. He relied on the Court of Appeal case of **Paul Muiyoro t/a Spotted Zebra v Bulent Gulbahar Remax Realtors [2016] eKLR**

5. On grounds 3 & 4, counsel for the appellant submitted that the trial court erred in considering the defence filed by the 1st respondent which was not properly on record having already entered interlocutory judgement. He relied on the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR** where the appellate court interfered with a judgement of a trial court who had put reliance on matters it should not have.

6. On ground 5, it was submitted that as there was already interlocutory judgement, this was a proper case for finding that the appellant had proved his case on a balance of probabilities. He relied on the case of **Charterhouse Bank Limited (Under Statutory Management) v Frank N Kamau [2016] eKLR**.

7. On ground 6, it was submitted that the trial magistrate failed to exercise his discretion to award costs judiciously by awarding the costs to the 1st respondents. He relied on the case of **Cecilia Karuru Ngavu v Barclays Bank of Kenya & Another [2016] eKLR**.

8. On grounds 8,9,10 and 11 it was submitted that the trial magistrate failed to give its decision on each issue. He relied on Order 21 Rule 5 of the Civil Procedure Rules 2010 as well as the case of **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR**.

C. 1st Respondents Case

9. It was submitted that the appeal herein was filed more than 5 months after the date of the decree in contravention of the statutory period set out in section 79G of the Civil Procedure Act and further that the appellant had not exhibited any certificate of delay nor any authority by court to file the appeal out of time.

10. The 1st respondent further submitted that there was a defence on record which had been filed on the 21st October 2016 and thus it was untenable that the trial court default judgement in default of appearance and defence on the 23.2.2017 and since the defence was not struck out by the court, the trial court was bound to consider it.

11. It was further submitted that it was the appellant who had framed the matter of liability as an issue for consideration by the trial court and cannot turn around and accuse the trial court of err is considering the liability.

12. The 1st respondent further submitted that that attachment and sale of the subject motor vehicle was as a result of a valid court order issued in Embu SPM Misc. Civil Application No. 32 of 2014, an order which had not been set aside and thus the 1st respondent cant be held liable. He relied on the case of **MNM v PNM [2016] eKLR**.

13. It was further submitted that the appellant did not controvert the allegations set out in the statement of defence and the same therefore constituted admissions of facts. He relied on the case of **Crescent Construction Co. Ltd v Caltes Oil Kenya Limited [2016] eKLR**.

14. The 1st respondent further submitted that the trial court correctly found that to the appellant failed to demonstrate that he had paid the debt owed to the 1st respondent and thus therefore the 1st respondent had a right in law to recover a debt from him as the guarantor. He relied on the Court of Appeal decision in **Mwaniki v National Bank of Kenya Ltd & Anor [2016] eKLR**.

15. The 1st respondent submitted that the appellant's claim for loss of use is a claim for special damages which ought to have been specifically pleaded and proved for the court to grant the same and therefore the court was correct in dismissing the entire claim. He relied in the case of **Equity Bank Ltd v Gerald Wangombe Thuni [2015] eKLR**.

16. In conclusion, the 1st respondent submitted that it was not in dispute that the appellant was a guarantor for a loan and it was only fair that they had a right to recover the same and consequently the appeal was an abuse of the court process and ought to have been dismissed.

D. Analysis & Determination

17. I have considered the grounds of appeal, the written submissions on behalf of the appellant and the 1st respondents, the authorities cited and the applicable law. The appeal before me is a first appeal and this court has jurisdiction to re-consider the evidence re-evaluate it afresh and draw its own conclusion though that jurisdiction must be exercised cautiously bearing in mind that the learned trial Judge had the advantage of seeing and assessing the demeanour of the witnesses. See **Peters -v- Sunday Post [1958] EA 424**; and **Selle -v- Associated Motor Boats Company Limited [1968] EA 13**.

18. I will first address the issue of the validity of this appeal as raised by the 1st respondent. The 1st respondent submitted that the appeal herein ought to be dismissed as it was lodged more than 5 months after the date of the decree in contravention of the statutory period set out in section 79G of the Civil Procedure Act and further that the appellant had not exhibited any certificate of delay nor any authority by court to file the appeal out of time.

19. Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

20. In the instant case, judgement was delivered on 27th June 2017. The memorandum of appeal was filed in court on the 6th July 2017 as shown by the official stamp of the court.

21. From the foregoing dates, it is clear that the appeal was filed within the prescribed 30 days. It is the record of appeal that was filed on 27th November 2017 which was well within the 21 days prescribed within the 21 days prescribed under order 42 Rule after the admission of the appeal. This appeal was admitted on 20th November 2017.

22. I find that this ground has no merit for it is not supported by the court record.

23. I will now turn to the issue of the interlocutory judgement entered against the 1st respondent as it is the foundation on which the grounds in the appellant’s memorandum of appeal rest. It is worth noting that the amended plaint by the appellant was filed on the 6th October 2016. I take note from the court record that the 1st respondent filed a statement of defence on the 21st October 2016. My computation of the time reveals this to be a difference of roughly 12 days.

24. Order 10 Rules 4, 5, 6 and 7 of the Civil Procedure Rules, 2010 provide that an interlocutory judgment shall be entered only where the suit is for a liquidated demand, pecuniary damages or the detention of goods. In the case of **Mint Holdings Ltd & Another vs Trust Bank Ltd [2000] eKLR**, the Court of Appeal held as follows: -

“The prayers sought by the appellants in their plaint do not entitle them to an interlocutory judgment in any event. As pointed out there was no liquidated demand. Judgment could only have been entered upon formal proof. The entry of such interlocutory judgment was irregular as Order IXA (now Order 10) of the Civil Procedure Rules does not cater for entering of an interlocutory judgment when the nature of reliefs sought requires formal proof”

25. It was held by Lord Denning in **Macfoy vs United Africa Co Ltd [1961] 3 All ER at Page 1172(1)** wherein he stated as follows: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is to sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

26. Prayer (avii) in the appellant’s aforementioned plaint seeks “a declaration that the attachment and sale of the plaintiff’s motor vehicle registration number KAW 978R is illegal, null and void.”

27. It is my considered view that the interlocutory judgment entered where the reliefs sought in a plaint were declaratory in nature was irregular and should not have been entered.

28. Consequently, given that the interlocutory judgement entered against the 1st respondent herein was the foundation upon which the grounds of appeal herein emanate, this court will proceed to re-consider the evidence re-evaluate it afresh and draw its own conclusion.

29. It is not in dispute that the appellant was a guarantor to the loan borrowed by one Rosalinda Kiagondu Wawira. I am persuaded by the authority cited by the 1st respondent specifically **Ebony Development Co. Ltd v Standard Chartered Bank Ltd [2008] eKLR** where Khaminwa, J on delivering on the issue of the liability of guarantors held that:

“The security of charge was a guarantee. The obligation of a guarantor is clear. It becomes liable upon default by the principal debtor. The charge concerning this matter is the second charge updating the indebtedness of the borrower. It is not the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum.”

30. I am convinced that the 1st respondent was right to approach the court for an order to sell the vehicle of the appellant for recovery of the outstanding loan. It did not matter that the appellant was not a party to the application in his pursuit of the appellant’s motor vehicle that was given as security.

31. The attachment and sale of the motor vehicle subject of the suit was made pursuant to the court order issued in Embu SPM Misc. Civil Application No. 32 of 2014 with the appellant admitting the same at paragraph 7B of his amended plaint. I am in agreement with the authority cited by the 1st respondents advocate in this regard.

32. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

33. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Papatlal Shah & Others Civil Application No. Nai. 39 of 1990**. As such it was only prudent that if the appellant was aggrieved by a court order it was upto him to move court appropriately to have the same set aside or quashed. It is my finding that the applicant has failed to satisfy this court on the grounds of appeal.

34. The appellant argued that although the defence had been filed, it was never served on him. It is trite law that a document filed and place in the court file becomes part of the court record. The appellant had the option of applying to the court to strike it out before the hearing commenced. He did not make such an application before the court.

35. I am of the view that the defence was valid and the magistrate was entitled to consider it in his judgment.

36. Having found that the respondent sold the vehicle on the strength of a court order that was not contested and that the appellant was a guarantor to a debtor who had failed to meet his contractual obligations, I am of the considered view that the sale was lawful.

37. I have already found that the interlocutory judgment was contrary to **Order 10 Rules 4, 5 and 6 of the Civil Procedure Rules**. As such the magistrate did not err in revisiting the issue of liability. Neither did the court err in considering the defence on record for reasons given in the judgment.

38. It is my finding that this appeal has no merit and it must fail.

39. On the issue of costs, I am of the opinion that the court ought to use its discretion in awarding costs given the special circumstances of this case. It is the court that erred in entering interlocutory judgment contrary to Order 10 of the Civil Procedure Rules. I also take note that the 1st respondent did not serve the defence.

40. For these reasons I hereby order that each party will meet its own costs for this appeal and the court below.

41. Consequently, the judgment of the learned magistrate is upheld.

42. The appeal stands dismissed.

43. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nzekele for Mr. Waweru Macharia for Appellant

Appellant present