



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 241 OF 2015

DAVID NZIOKA ENOS.....APPELLANT

- V E R S U S -

AGNES WANJIKU KAGWANJA.....RESPONDENT

RULING

1) Agnes Wanjiku Kagwanja, the respondent herein, filed an action before the Chief Magistrate's Court sitting in Milimani Commercial Courts, Nairobi in which she sought for judgement in the sum of ksh.2,073,436/71 with interest from David Nzioka Enos, the appellant herein. The aforesaid amount is said to be a friendly loan advanced to the appellant by the respondent. The suit was defended by the appellant. The suit was heard and determined in favour of the respondent by hon. Ole Keiwua, learned Principal Magistrate. Being dissatisfied with the decision, the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds in his memorandum:

- 1. THAT the learned trial magistrate erred in law and in fact in holding that the respondent has proved her case on a balance of probabilities when the evidence adduced proves the contrary.***
- 2. The learned trial magistrate erred in law and in fact by holding that the appellant should pay the respondent a sum of ksh.2,027,436.71 as of 9th May 2012 together with interest hereon at a rate of 42% per annum until payment in full together with cost of the suit.***
- 3. The learned trial magistrate erred in law and in fact in failing to consider that the appellant evidence that the alleged agreement and interest rate was illegal, unconscionable and fraudulent.***
- 4. The learned trial magistrate erred in law and in fact in failing to consider that the respondent is not a financial/ lending institution and therefore not legally entitled to such high, illegal, unconscionable, oppressive, fraudulent and exorbitant.***
- 5. The learned trial magistrate erred in law and in fact misdirected himself in holding that it is not for the court to interrogate the contract entered between the parties whereas there was very clear evidence of illegality, fraud and unconscionability of the contract.***
- 6. The learned trial magistrate erred in law and in fact in failing to appreciate that even the time the alleged agreement was entered, a substantial amount of kshs.800,000/= had been paid leaving a balance of ksh.150,000/= and therefore the respondent was not entitled to such high interest if any on a loan already repaid.***

7. The learned trial magistrate erred in law and in fact in failing to make a finding whether the said agreement was made in good faith, and or was oppressive, fraudulent and illegal interest hereof unreasonable, excessive, iniquitous, exorbitant, unreasonable and prejudicial appealing to the appellant.

8. The learned trial magistrate erred in law and in fact in failing to the mode of finding on the unconscionability of the alleged contract whether it was unduly harsh, manifestly excessive, grossly unfair and commercially unreasonable given the existing circumstances of the case.

9. The learned trial magistrate erred in law and in fact by being biased toward the appeal and also in delivering judgment irregularly.

10. The learned trial magistrate erred in law and in fact giving judgment without giving the reasons thereof and the basis of his judgment.

3) When the appeal came up for hearing, the respondent raised a preliminary objection to have the appeal struck out for being incompetent. It is said that the appeal was filed out of time fixed for filing appeals under Section 79G of the Civil Procedure Rules. Learned counsels recorded a consent order to have the appeal disposed of by written submissions.

4) I have considered the rival written submissions. It is the submission of the respondent that the appellant having failed to file his appeal within the statutory period and having also failed to seek for leave, the appeal should be struck out. The appellant on the other hand admitted that the appeal was filed out of time and without leave. The appellant pointed out that the appeal was filed out of time and without leave by his erstwhile advocate. The appellant urged this court not to let the mistakes of his counsel be visited upon him. The appellant beseeched this court to exercise its discretion in his favour by extending time to file an appeal out of time.

5) The main reason the appellant has relied in asking this court to spare the appeal is that the appeal was filed out of time by his previous advocate hence he should not suffer for the mistakes of his advocate. Under the provisions to Section 79G of the Civil Procedure Act, the court is given a wide discretion to admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. I expected the appellant to give a detailed explanation to convince this court to indulge him. Unfortunately, the appellant decided to blame his former advocate for filing the appeal late. It is possible the appellant approached his former advocate late to institute appeal. I find the ground advanced by the appellant not good nor sufficient. In the circumstances I find the preliminary objection to be well founded. It is upheld

6) In the end, the appeal is ordered struck out for being incompetent having been filed out of time without leave. The respondent to have costs of the appeal.

Dated, Signed and Delivered in open court this 9th day of June 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent