REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL CASE NO. 192 OF 2013

ELIJAH WACHIRA MUGO……..……APPELLANT

VERSUS

JOHN MURIITHI KINYUA..……..…….….RESPONDENT

(Being appeal from the ruling and order of the Senior Principal Magistrate (S. N. Ndegwa) delivered on 4th day of May, 2011 in Kerugoya Civil Case No. 3 of 2004)

JUDGMENT

1. This is an appeal preferred by **ELIJAH WACHIRA MUGO** (hereinafter to be referred to as the appellant) against the ruling of Senior Principal Magistrate's Court in Kerugoya S.P.M.C.C. No. 3 of 2004 delivered on 4th May, 2011 which ruling favoured John Muriithi Kinyua the respondent herein.
2. The brief history of the case at the trial court indicates that the appellant was sued by the respondent for Kshs.14,000/= plus interests of 40% per month which as per a plaint dated 7th January, 2004, arose from a friendly loan extended by the respondent to the appellant at his own request. The appellant apparently failed to enter appearance and defence within stipulated time and as a result an *exparte* judgment was entered in default on 4th March, 2004 and thereafter the respondent embarked on execution of the decree by committing the appellant (judgment debtor) to civil jail on 22nd April, 2004. Later on 21st April, 2004 the appellant (judgment debtor) was released by the trial court upon commitments to go and look for the money which by then stood at Kshs.140,000/= inclusive of interests.
3. Later on vide Chamber Summons dated 22nd July 2004, the appellant brought an application asking for the following reliefs:-

i. ***That the interlocutory judgment entered against the defendant on the 15th March, 2014 be set aside.***
ii. ***That the defendant be granted leave to file his defence out of time.***
iii. ***That the defence appended hereto be deemed as filed.***
iv. ***That costs of this application be provided for.***

4. The trial court after hearing both parties in the application on 30th July, 2004, found no merit in the application finding that the proposed defence was a sham raising no triable issue.
5. Later on 21st March, 2011 the appellant filed another application vide a Notice of Motion dated 21st March, 2011 this time asking the trial court for the following reliefs:-

i. ***That the application be certified urgent.***

ii. ***That the honourable court be pleased to set aside its judgment entered on 4th March, 2004 and review the subsequent decree dated 15th March, 2004 and orders of 28th April, 2009 and be pleased to issue an order that the plaintiff/respondent be paid principle amount at court rate.***
iii. ***That the plaintiff/respondent through his counsel to give an account on how he arrived at the figure of Kshs.131,600 as per the decree dated 15th March, 2004 and Kshs.253,955 as per notice to show cause dated 21st October, 2010.***
iv. ***That this court be pleased to issue any other or further orders as it deemed fit and just.***

6. The trial court heard both parties and through a ruling delivered on 4th May, 2011 dismissed the application for *inter alia* being *res-judicata* and the inordinate delay in presenting the said application. The trial court further declined to review/vary the judgment and the interests that the principle sum was accruing because the subordinate court considered that the judgment had been entered at 40% interest per month and from 2004 the appellant had not applied for the same to be varied.
7. The appellant felt aggrieved by that ruling and preferred this appeal citing 12 grounds namely:-

i. ***That the learned magistrate erred in law and fact in dismissing his application dated 21st March, 2011 without substantive submissions/arguments.***
ii. ***That the learned magistrate erred in law and fact in dismissing the said application without assigning any reason.***
iii. ***That the learned magistrate erred in law and fact by holding that the appellant's application was res-judicata without considering that there were new issues in the said application.***
iv. ***That the learned magistrate erred in law and fact by failing to hold that the expart judgment entered was on a technicality and not on merit.***
v. ***That the learned trial magistrate erred by overlooking the contested issue of 40% per month interest on the principle amount.***
vi. ***That the learned magistrate erred in law and fact by holding that the judgment was entered as per the plaint when there was no documentary proof to establish the 40% interests per month.***
vii. ***That the learned magistrate erred in law and fact by not holding that the respondent did not prove his case.***
viii. ***That the learned magistrate erred in law and fact by not considering the fact that the appellant had paid the respondent over Kshs.98,000/= which was far above the principle amount of Kshs.14,000/=.***
ix. ***That the learned magistrate erred in law and fact by failing to note that the appellant was not given the requite 10 days notice of judgment before execution of the decree.***
x. ***That the learned magistrate erred in law and fact by overlooking legal provisions.***
xi. ***That the ruling was vague and unreasonable.***
xii. ***That the learned magistrate erred in law by ignoring arguments put across by the appellant.***

8. At the hearing of this appeal, the appellant who was unrepresented emotionally narrated his ordeals as a result of exparte judgment entered against him and the attendant execution process which included 30 days in civil jail and attachment of his salary. He submitted that he has already paid more than Kshs.98,000/= to the respondent in this appeal and that despite that the respondent had caused a restriction on his property parcel No. **MWERUA/KANYOKORA/670** causing him stress and psychological problems. He maintained that he was never served with the suit papers and was only confronted one day while in school in his duties when he was arrested and taken to court where he was committed to civil jail for 30 days.
9. The respondent through learned counsel Mr. Ndana opposed this appeal arguing that the appellant borrowed a friendly loan of Kshs.14,000/= and agreed that he would pay an interest of 40% per month and left a security in form of a title to his property. He submitted that the appellant was sued and duly served but failed to enter appearance and defence on time and hence the entry of judgment and the attendant execution process.
10. The respondent faulted the appellant's application dated 21st March, 2011 for being *res judicata* pointing out that the appellant had made a similar application dated 22nd July, 2004 through Ochanda advocate whereupon the trial court gave a ruling on 12th August, 2004 dismissing the

application. He further pointed out that the appellant had in his application annexed a draft defence admitting the debt of Kshs.14,000/= (fourteen thousand) owed to the respondent. In his view the only dispute was the question of interests. He admitted that the appellant so far has paid Kshs.90,000/= out of the total decretal amount which he stated was Kshs.131,000/=.

11. Mr. Ndana also conceded that the respondent had no problem with the restrictions on the appellant's property being removed as the respondent no longer had any interest on the restriction placed on the same.

12. This appeal has presented fundamental issues that need careful considerations by this court and I must admit that this court took considerable amount of anxious moments brooding over them. These are as follows:-

i. Whether a potentially illegal contract is sustainable in law.
ii. Whether the appellant's application dated 21st March, 2011 whose ruling is the subject of this appeal was *res judicata* and whether the scope of doctrine of res judicata covers instances such as obtaining herein.

13. To begin with the first issue, it is quite apparent from the pleadings filed at the subordinate court that the suit against the appellant was based on contract. Although a copy of the same was not availed owing to the entry of *exparte* judgment in default of appearance and defence as aforesaid, it is discernible that the appellant had borrowed Kshs.14,000/= from the respondent (a fact that is not denied by the appellant) which was to attract interests of 40% per month. This rate of interest which translated to 480% per annum in my view was not only unconscionable but unreasonably so high that it turned the loan to be anything but friendly. The respondent termed the money advanced to the appellant as "a friendly loan" and that the money was meant to help and bind the parties but the rate of interest in my view was untenable and fraudulent because the aim or intention could only be one – to fleeze and not to help. The argument that the appellant freely signed the agreement is moot especially given that the case did not go to full trial.

14. I also find that it would be a travesty of justice and against public policy to give this sort of agreement the force of law because its effect obviously is against public policy. An interest rate of 480% per annum for all intents and purposes is immoral, illegal and unenforceable. This is a finding and observations that was also made in the case of **D. Njogu & Co. Advocates -Vs- National Bank of Kenya**, where the court quoted in approval the decision in **PATEL -VS- SINGH (1987) KLR** that;

"No court ought to enforce an illegal contract where the illegality is brought to its notice……..."

In making this observation the court further made the following illustrations about illegal contracts:

"(a) If at the time of making the contract there is an intent to perform it in an unlawful way, the contract although it remains alive is unenforceable at the suit of the party having intent and where the intent is common, it is unenforceable at all.

(b) The illegality may prevent a plaintiff recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act. He may not recover even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal.

(c) An illegality may also have the effect of making the contract void ab initio and that arises if the making of the contract is expressly or implicitly prohibited by statute or otherwise contrary to public policy."

15. This position was similarly taken in the case of **Danson Muriuki Kihara –VS- Amos Kithua Gatongo [2012] eKLR,** where the plaintiff had filed a claim for Kshs.40,000/= plus interest at 50% per month against the defendant. The matter proceeded to full hearing but the learned trial

magistrate entered judgment for Kshs.40,000/= plus interests at court rates. The appellant appealed against the judgment on the ground that the trial court had reduced the rate of interest from 50% per month as per the agreement to interests rates pegged at the court rates. Hon. Justice Ongundi sitting in Embu, held that the interest rate of 50% per month was unconscionable and made the following observation which I agree with;

"An interest of 50% per month was agreed on. This calculates to an interest of 600% per annum. Given the financial institutions which are authorized to charge interest do not charge those kind of rates……..this bargain between the appellant and Respondent is found by this court to be unconscionable in the sense that no man in his senses and not under delusion would agree to such an interest rate. Even no honest or fair man would make such an offer to a friend. This rate is so unreasonable and oppressive to the respondent even though they had agreed to it. The appellant took advantage of the respondent's situation to fleece him."

This is a situation that is replicated in this case and I find that had the matter gone for full trial at the subordinate court the finding of the trial court would not have been any different.

16. I have also checked at the definition of an illegal contract in ***Oxford Dictionary of law 5th Edition*** which defines illegal contract as;

"a contract that is prohibited by statute or is illegal at common law or on grounds of public policy. An illegal contract is totally void, but neither party (unless innocent of the illegality) can recover back any money paid or property transferred under it."

This definition fits the description of the alleged contract between the appellant and the respondent herein. This explains why the same ought to have been interrogated and scrutinized through a full trial which was lacking in this case. Some aspects to the said contract and particularly the implications of the interests thereof were not lawful.

17. On the 2nd issue of *res judicata* raised by the respondent, it is true that the provisions of **Section 7** of **Civil Procedure Act** provides that an issue that has been determined in court on merit between the same parties should not be entertained in court again. The said section states as follows:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigation under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

So what is the meaning of *res-judicata*? the ***Black's Law Dictionary*** gives a more clearer meaning of the doctrines and defines it as a Latin word meaning *"a thing adjudicated"* or an issue that has definitely been settled by judicial decision. The same dictionary gives 3 elements that are essential in this doctrine. These are:

"(a) An earlier decision on the issue'

(b) a final judgment on the merits; and

(c) the involvement of the same parties or parties in privity with the original parties."

18. This court has laid out the reliefs that the appellant sought in his Chamber Summons dated 22nd July, 2004 and the application through a Notice of Motion dated 21st March, 2011. The subordinate court dismissed both applications with the latter dismissal being the subject of this appeal. A close look at the prayers sought in the two applications shows that they are not, strictly speaking, similar. In the former application, the applicant sought to set aside interlocutory

judgment and leave to defend the suit out of time. I have looked at the proceedings and noted that there was no interlocutory judgment entered by court on 15th March, 2014 as stated in the application. There was an *exparte* judgment entered on 4th March, 2004 which judgment was final. The application dated 22nd July, 2004 therefore did not competently address the actual relief being sought whereas the appellant in his Notice of Motion dated 21st March, 2011 competently prayed for the actual judgment that had been entered against him to be set aside. The two applications can be viewed as different and distinct although substantially they address the same main thing which was to set aside the judgment entered against the appellant.

19. This court, however, finds that the Notice of Motion dated 21st March, 2011 sought for different reliefs as enumerated under prayer (iii) and (iv) above. The doctrine of *res judicata* could not strictly apply against the appellant herein and the trial court fell into error by concluding that the doctrine applied. This clearly led to a miscarriage of justice. This Court finds that the appellant's 3rd ground of appeal is well grounded in this respect.
20. The trial court also faulted the appellant in its ruling for inordinate delay in seeking justice particularly on the issue of interest rates. This could have been justified but given the circumstances and particularly the fact that the appellant was unrepresented the trial court ought to have considered the application in light of **Article 48** of the **Constitution of Kenya 2010** and allow "wanjiku" to access to justice without any impediments. This Court has noted that there were glaring discrepancies on the amounts reflected on the warrants issued against the appellant on 26th January, 2009 which showed that the appellant was required to pay a staggering amount of Kshs.253,955/= and the amount reflected on the decree passed which was Kshs.131,600/=. The appellant in my view had basis to question the calculations or accounts because by 2009 he had already paid some amount to the decree holder. The amounts paid are not reflected and one wonders whether the respondent really intended to help his friend or he simply wanted interests to keep on piling until such time that it would be practicably impossible for the appellant to redeem his property. If that was the intention then the same was mischievous and a flagrant breach of friendship and justice. This is something that ought to have been addressed by the trial court but was not to the detriment of the appellant.
21. This Court finds that the scope of the doctrine of *res judicata* should not have been extended to apply to the appellant's application dated 21st March, 2011. That application should have been viewed under the lens of **Article 159 (2) (d)** of the **Constitution** which provides that justice should be administered without technical hindrances. In my view the effect of disallowing the appellant's application had the draconian effect of locking the appellant away from the seat of justice. This is something that the Constitution frowns at and justice demands that such should be avoided.

In the end I find that the interests of justice demands that I find merit in this appeal which I do by allowing it with costs. The Notice of Motion dated 21st March, 2011 is allowed on the following terms:

i. The judgment entered on the principal sum of Kshs.14,000/= against the appellant (admitted by the appellant in this appeal) is upheld.

ii. The interests rate of 480% per annum is reviewed and set aside for being unconscionable, oppressive and illegal and in its place the interests rate of this Court shall apply.

iii. The restrictions placed by the respondent on the appellant's property described as **MWERUA/KANYOKORA/676** shall be removed and the County Lands Registrar is directed to remove the same forthwith.

iv. Accounts shall be taken between the parties in order to establish if and whether there is any amount outstanding or overpaid in view of the fact that the respondent admits having been paid Ksh.90,000/= while the appellant puts the figure at Kshs.98,000/=. The parties are encouraged in view of passage of time and what has already taken place to pursue alternative disputes resolution to bring this matter to an end. In default of agreement/settlement the accounts shall be done

before the Deputy Registrar of this Court.

Dated and delivered at Kerugoya this 4th day of July, 2016.

K. LIMO

JUDGE

4.7.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Wangechi holding brief for Respondent/appellant in person.

COURT: Judgment signed, dated and delivered in the open court in the presence of Wangechi holding brief for Ndana appearing for the respondent and Elijah Wachira appellant in person.

K. LIMO

JUDGE

4.7.2016