REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: AKIWUMI, TUNOI & OWUOR JJ.A.)
CIVIL APPEAL NO. 126 OF 1998
BETWEEN

OFFICIAL RECEIVER & INTERIM LIQUIDATOR
CONTINENTAL CREDIT FINANCE LIMITED .....APPELLANT
AND
DETO INVESTMENT COMPANY LIMITED .....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at
Machakos (Justice Mwera) dated 2nd October, 1996
in
H.C.C.C. NO. 100 OF 1994)
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JUDGMENT OF THE COURT

The respondent who was the plaintiff in the suit before the High Court, sued the appellant as disclosed in its Further Amended Plaint for special damages and general damages arising out of the fraudulent act on the part of the appellant, and for general damages for breach of contract by the appellant.

The background to the suit is as follows.

The respondent on 27th June, 1982, borrowed from the appellant Kshs.1,275,000/= to build five maisonettes, upon the undertaking given by the Kenya National Assurance Co. Ltd (KNA) of 28th May, 1982, that it would repay the loan to the appellant on demand by it and after the completion of the building of the maisonettes. In consideration of this undertaking, the respondent, inter alia, mortgaged the maisonettes to KNA. The offer of advance by the appellant of the money involved which is dated 27th June, 1982, and which was produced at the hearing was not signed by the respondent.

On 13th September, 1983, the respondent mortgaged the maisonettes to the appellant, in consideration of the second loan of Kshs.217,000/=. This mortgage strangely, preceded a related offer of advance by the appellant on the security of the maisonettes dated 26th September, 1983, and which was accepted by the respondent.

The respondent alleged a breach of contract on the part of the appellant in that, contrary to the offer of advance of 27th June, 1982, and the offer of advance of 26th September, 1983, and not the related mortgage of 13th September, 1983, the appellant inflated the amount due from the respondent; that the appellant deliberately failed for about six years to demand when it should have done so, in November, 1983, the repayment by KNA in accordance with its undertaking in respect of the Kshs.1,275,000/= advanced to the respondent by the appellant, and thus, grossly inflating the amount due from the respondent to the appellant; that the appellant wrongfully treated the accounts involved in the separate loans as one and so inflated the amount due from the respondent and also charged illegal penalties thereon; and that the appellant caused the maisonettes to be irregularly sold by public auction at an

undervalue. The respondent then claimed general damages for this breach of contract.

As regards the allegation of fraud, the respondent having given the particulars of fraud, sought special and general damages. It is important to note that the special damages it sought constituted the difference between the actual market value of the maisonettes as at 2nd April, 1993, when they were sold by public auction on the instructions of the appellant, and the amount which the public auction fetched namely, Kshs.5,000,000/=. But the learned Judge, (Mwera J.) having found that fraud had not at all been established, dismissed this aspect of the plaint and no special or general damages were naturally, awarded. A point, however, to bear in mind is that if the respondent had succeeded on the issue of fraud, would the damages awarded as special damages have been the same amount as that that may be awarded by way of general damages? We do not think that that would be necessarily so, and we bear this in mind when we come to deal with the quantum of general damages that was awarded against the appellant for breach of contract and which had been calculated by the learned Judge on the formula that the respondent had sought in its Further Amended Plaint, to be applied in respect of special damages for fraud.

It is against this judgment and the dismissal of the appellant's counterclaim in which the balance of the unpaid loan and interest thereon amounting altogether to Kshs.10,600,000/= is sought from the respondent, that the present appeal has been instituted. The only grounds of appeal that appear relevant to us as would be seen from the views we have expressed hereunder, are that:

> "... the learned judge erred in law and in fact in entering judgment against the defendant
>
> . ... the learned judge erred in law in dismissing the appellant's counterclaim.".

Reverting to the respondent's claim for damages for breach of contract, (which in this particular instance is not dissimilar from negligence on the part of the appellant) can it be said that the appellant was fully to blame? On the facts, it appears that the respondent by its letter of 4th November, 1983, requested the appellant to demand payment from KNA, on the grounds that it had finished building the maisonettes and that the appellant had replied by its letter of 18th November, 1983, that it would do so and that the matter should be left to it. Strangely enough, the appellant it is alleged, did not demand repayment of the first loan from KNA, until 1989. This led to the alleged wrongful combination by the appellant of the two loans and the charging of interest on the accumulated sum. The signed copy of the appellant's offer of advance in respect of Kshs.1,275,000/= was not produced but it is clear from the mortgage of 13th September, 1983, that it did not cover the first loan of Kshs.1,275,000/= or any interest accruing thereon. However, the agreement dated 14th September, 1981, between KNA and the respondent setting out the pre-disbursement conditions which should first be fulfilled by the respondent before KNA would honour its undertaking to repay the respondent's first loan, was produced. It certainly was not automatic and if KNA failed to honour its obligations, the respondent in respect of whose maisonettes, KNA held a first mortgage, could take action against KNA.

And so, what happened after the respondent had in November, 1983, informed the appellant that the building of the maisonettes had been completed? It is the respondent's case that instead of demanding repayment from KNA, the appellant continued to charge interest on the combined loans made to the respondent. It appears that no repayments were made on the outstanding combined loan for nearly ten years, when the maisonettes were sold by public auction on the instruction of the appellant.

Prior to the public auction, the respondent knew that it would take place because at least, it had not repaid the second loan granted to it by the appellant and interest thereon, and which was the subject of the mortgage of 13th September, 1983. In the letter of 26th June, 1991, which was further to a letter of 20th August, 1991, the respondent's Advocates wrote to the appellant and stated that apart from the sum of Kshs.1,275,000/= which had been repaid by KNA, what was outstanding, were the accrued interest on Kshs.1,275,000/=, the second loan of Kshs.273,500/= and accrued interest on this second loan, which "sum is secured by a second mortgage over the property since there is a first mortgage in favour of" KNA. The total of this sum was declared as Kshs.1,800,000/= which the respondent's Advocates in his letter, had said that given time, could be repaid by the respondent from money borrowed from financiers and, admitting the appellant's power of sale, continued as follows:

"which offer is more than generous since the Receiver will collect more than the amount he could recover should be decide to call the security. Please let us have your urgent response to enable our client make the necessary arrangements with his bankers.".

Prior to the letter of 26th June, 1991, there were some pertinent correspondence that deserve consideration. On 15th March, 1985, the appellant wrote to their Advocates, Muthoga Gaturu & Co., setting out what was owed it in respect of the second loan and stating that it had not received the Kshs.1,275,000/= from KNA apparently because the respondent had not fulfilled pre-disbursement conditions required to make KNA honour its undertaking to repay that amount to the appellant.

However, KNA's unconditional undertaking to the appellant should be unaffected by this. On 19th August, 1985, the appellant again wrote to its Advocates instructing them not to enforce KNA's undertaking, but rather, take action against the respondent unless it satisfied the pre-disbursement conditions required in its undertaking agreement with KNA, to honour the latter's undertaking to the appellant. About a year later on 16th July, 1986, the Advocates of the appellant wrote to the respondent demanding acceptable proposals for the repayment of its outstanding debt and a statement from KNA, to the effect, that the respondent had complied with the terms of the undertaking agreement with KNA. On 17th February, 1989, KNA wrote to the Advocates of the appellant in reply to what must have been a demand letter from the appellant, that the respondent had failed to fulfil "two fundamental predisbursement conditions" and that it will get in touch with the appellant's Advocates by 15th March, 1989. On 8th June, 1989, KNA without stating any other reason for the delay involved, but acting in conformity with its undertaking of 28th May, 1982, sent to the appellant's Advocates a cheque for the outstanding first loan of Kshs.1,275,000/=.

It would seem therefore, from the foregoing, and the correspondence between the appellant and its appointed auctioneer of 15th January, 1992, 28th January, 1992, 25th February, 1992, 3rd March, 1993 and 8th March, 1993, and the letter from the appellant to the respondent of 29th April, 1992, which gave the respondent a further fifteen days grace to look for money to save its maisonettes from being auctioned, that the respondent was well aware that the appellant was properly going to exercise its right of sale within the ambit of the mortgage of 13th September, 1983.

And so what damage did the respondent suffer as a result of the auction sale of its maisonettes which was found not to have been fraudulent? In these circumstances the amount of general damages should be based on the amount that was not recoverable under the mortgage namely, all the interest that had accumulated on the loan of Kshs.1,275,000/=. This, according to the evidence of Benjamin Ireri Ikombe, the Accountant of the appellant, amounted at 15th June, 1989, to Kshs.3,993,975/60. But taking into consideration that the auction took place in April, 1993, we would add to it a further Kshs.1,000,000/= making a total sum of Kshs.4,993,975/60 by way of general damages and interest thereon at court rates from 2nd April, 1993. We do not think that the learned Judge erred in entering judgment against the appellant except that the damages awarded should have been Kshs.4,993,975/60 with interest thereon at court rates from 2nd April, 1993, and it is so ordered.

As regards the dismissal by the learned Judge of the appellant's counterclaim, and based on our analysis of the facts and law above, we conclude that the appellant did not establish its counterclaim and the appellant's appeal on the ground that the learned Judge erred in law in dismissing the appellant's counterclaim, is dismissed and it is so ordered.

The respondent's cross appeal having regard to our assessment of the law and facts as set out above, is also dismissed.

Having regard to the particular circumstances of this appeal and the cross appeal, each party shall bear its own costs.

Dated and delivered at Nairobi this 22nd day of October, 1999.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.