REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 86 of 1996

HERMAN P. STEYN.....APPELLANT

AND

CHARLES THYS.....RESPONDENT

(Appeal from the decision of the Honourable (Mr. Justice A.M. Cockar)

at Nairobi on the 19th day of June, 1989

IN

H.C.C.C. NO. 1508 OF 1984)

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JUDGEMENT OF THE COURT

This is an appeal by Herman P. Steyn, the defendant, from a judgement of the superior court (Cockar, J., as he then was) dated June 19, 1989 whereby he entered judgement for Charles Thy, the plaintiff, for U.S. Dollars 439,587 being the amount of three written acknowledgements from the defendant to the plaintiff, interest thereon and costs.

By a plaint dated May 20, 1984 (but filed on May 28, 1984), the plaintiff claimed against the defendant the sum of US Dollars 217,995 being the balance owed by the defendant to the plaintiff as on November 30, 1979 for cash lent and advanced by the plaintiff to the defendant at the latter's request at Nairobi during the years 1978 (December 18, 1978) and 1979(January 12 & 19, 1979) and for agreed interest thereon full particulars whereof were well within the knowledge of the defendant and had been supplied to him. The defendant's defence was a denial and no more. Seven agreed issues were framed on February 4, 1986 well before the hearing of the action which commenced on November 12, 1986. At the trial, the plaintiff gave evidence and produced the three written acknowledgements admittedly signed by the defendant acknowledging payment to him of the sum of US Dollars 217,995 having been advanced. During his cross examination, the defendant's advocates suggested that the money, subject of the suit, was loaned in Tanzania Currency and that it was repayable in Tanzania Shillings. In doing so, the defendant was raising an issue which was neither agreed nor pleaded. Apart from two witnesses he called, the defendant himself also gave evidence in which he repeated this assertion in his evidence in chief and was subjected to a cross examination thereon. In a reserved judgement the learned judge found for the plaintiff and entered judgement accordingly as above stated. Against that judgement the defendant has now appealed to this court raising five main grounds of attack. We now turn to consider these in turn.

First, it was submitted that the learned trial judge erred in failing to appreciate that there was no evidence on which he could find the plaintiff's case proved as pleaded and so also was the finding of the judge that the plaintiff had advanced to the defendant the claimed sums of money in Dollars overseas. It is true that the finding was an obvious and fundamental departure from the pleadings without any amendment of the same. But in our view the appellant himself I introduced the unpleaded issue into the evidence, led evidence thereon, cross examined the plaintiff vigorously in relation thereto and acquiesced into the unpleaded issue being canvassed and left to the court for a decision. In addition, the defendant also called witnesses in support of his assertion that the money was loaned in Tanzania Currency. Written submissions followed in which the advocates for both the parties dealt with this issue in detail.

In these circumstances, the determination of that issue became an issue at the trial with neither party objecting and both parties fully participating in it. This ground of appeal, therefore, must fail.

If the appellant did not object or acquiesced in a grave departure from the pleadings which were not amended, then the court itself was under a clear duty to refuse to deal with it. It was so argued by the appellant's advocates. With respect, we do not agree. This was a dispute of a civil nature between parties; it is not litigation belonging to the court or a judge personally. This is so firmly established in our law that a judge is not allowed in a civil dispute even to call a witness whom he thinks may throw some truth on the facts. He must rest content with the witnesses called by the parties: See Re Enoch & Zaretsky, Bock & Co, [1910] 1 K.B. 327. So also it is for pleadings; it is not for the judge to take it on himself lest by so doing, he appears to favour one side or the other. Having acquiesced in the departure and participated as set out above the appellant cannot now be allowed to complain that the trial judge was in error in view of the state of the pleadings.

Such a course as taken by the trial judge is well recognised in our law. In Odd Jobs Vs. Mubia [1970] E.A. 476, it was held:

"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;

on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it".

Odd Jobs (supra) was subsequently followed by the Court of Appeal for Eastern Africa in the cases of Nkalubo vs. Kibirige [1973] E.A. 102 and Railways Corporation vs. East African Road Services Ltd. (1975) E.A. 128.

Secondly, it was argued that there was no evidence on which the learned trial judge could find, as he did, that the plaintiff had loaned the defendant US Dollar 194,636 in Austria or Switzerland. With respect, we do not agree. The plaintiff specifically said so in the course of his evidence in chief and repeated the same during his cross-examination. This is indeed acknowledged by the learned trial judge in his judgment which he stated as follows: -

"I have very carefully considered the whole of the evidence before me including the three receipts which were written out by the defendant himself. On balance I prefer the evidence of the plaintiff and reject the evidence of the defendant whom I found to be unreliable and not worthy of any credibility. Even the unpleaded version which was given during evidence on behalf of the defence sounded unreasonable and far-fetched. I accept the plaintiff's evidence as being substantially the truth and find that the request by the defendant for a loan and the agreement to give the loan by the plaintiff, both verbal, were made in Nairobi. I also find that the plaintiff paid the loans overseas in the sums stated in the receipts in American dollars to the defendant by telegraphic transfers from his own overseas account No. 80674 in Swiss Bank Corporation in Basle, Switzerland, into a numbered account of the defendant in either Switzerland or Austria. I also find that the defendant had agreed to pay interest at the rate of 12% per annum up to 30.11.79 when the whole of the loan was to be re-paid. It is not disputed that the defendant has not paid back the loan or any part thereof or any interest so far".

Thirdly, it was contended by the advocates for the appellant that the learned trial judge misdirected himself in law in his application of the burden of proof. The learned trial judge in the present case wrote a very careful and lengthy judgement running into 20 pages of typescript in the record in which he reviewed all the evidence, weighed it and stated his conclusion. In fact we have carefully looked through the judgement for indications that the learned trial judge had the proper rule in mind and we find the following passage in his judgement at page 86 of the record when he stated as follows: -

"But from the above evidence of Gulam Chagani (D.W.2) and Merinyo (D.W.3) and from the evidence as a whole on this issue I reject the defendant's claim that he took a loan from the plaintiff in order to protect the latter's Tanzanian Shillings lying in Tanzania. I am satisfied that he was in need of money and I accept the plaintiff's evidence and I find on balance that the defendant had approached him for a loan. Where did that money for the loan come from is the issue I now propose to go into".

Again, at page 92 of the record he stated that on balance he preferred the evidence of the plaintiff and rejected the evidence of the defendant whom he found to be unreliable and not worthy of any credibility in the passage already cited above.

In any event, we may add that onus as a decisive factor could only arise if the evidence of both sides was balanced. As was said by the Privy Council in Robins vs. national Trust Company Limited [1927] A.C. 515 at p. 520: -

"Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered".

In this case, the parties led all the evidence they wished which the learned trial judge considered with care. The initial onus lay on the plaintiff and he was called upon to begin. Each of the parties was required to prove his respective assertion. We find no merit in this ground of appeal.

Fourthly, it was urged upon us that we should interfere in the finding of fact made by the learned trial judge. It was suggested that he had reached wrong conclusions on questions of fact. We do not agree. This is not one of those cases where there was no evidence to support any particular conclusion. It has not been suggested that the trial judge had failed to appreciate the weight or bearing of the circumstances admitted or proved or had plainly gone wrong. On the contrary, there was evidence before the learned judge of two versions. He preferred one to the other (as he was perfectly entitled to do) as, in his view, there was sufficient material to show that the appellant's version was not worthy of credit. In these circumstances, whilst this court has jurisdiction to review the evidence whether the conclusion of the trial judge should stand, this jurisdiction has to be exercised with caution. In this case, we are satisfied that there is no reason to interfere with the conclusion reached by the trial judge.

Finally, it was argued that the transaction was tainted with illegality in that it was in breach of the Exchange Control Act. This question was not one of the seven agreed issues nor was it pleaded. The learned trial judge was satisfied that neither of the parties was a resident in Kenya at the relevant time. Residential status for Exchange Control purposes is a question of fact and to be determined by reference to the circumstances of each case but in the absence of any pleading or issue there was no full inquiry of the relevant facts and we are satisfied that the basis of his decision is correct. In any event, we do not find any error in the determination of this issue by the trial judge.

As was observed by Duffus, P. in Odd Jobs case (supra): -

"There has been an irregularity in the pleadings but this court will not usually interfere with a judgement if it is satisfied that there has been no failure of justice or lack of jurisdiction. I am satisfied that the issue

was before the court and that the parties were heard on the issue and the main question here is whether or not the appellant suffered any prejudice or injustice by the course that the proceedings took".

We respectfully agree. The unpleaded issue was properly left to the determination of the court by the conduct of the course of the trial and the learned trial judge was justified on the evidence in arriving at the decision that he did. This is a case on which we are satisfied that there has been no miscarriage of justice and that , on the contrary, it will be unjust now to allow the appellant to succeed on this issue.

Accordingly and, for the reasons above stated, the appeal is dismissed with costs.

Dated and delivered at Nairobi this 7th day of November, 1997.

J.E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

G.S.PALL

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JUDGE OF APPEAL