Standard Bank Limited v D L Patel Press (Kenya) Limited

Court of Appeal, at Nairobi April 3, 1985

Kneller, Nyarangi, JJA and Chesoni, Ag JA

Civil Appeal No 16 of 1983

(Appeal from High Court at Nairobi, Todd J, Civil Suit No 2047 of 1980)

April 3, 1985, Kneller JA delivered the following Judgment.

This is an appeal by the Standard Bank Limited (the Bank) from the judgment of Mr Justice Todd in the High Court at Nairobi on June 29, 1982 in which he dismissed with costs the Bank's claim against DL Patel Press (Kenya) Limited (The Press).

It is resisted by the Press which has also filed a notice of grounds for affirming the decision other than those on which the learned judge relied, and the Bank in turn, asks for that to be dismissed with costs.

The Bank filed its plaint on July 29, 1980 and in it prayed for judgment against the Press for Kshs 130,809.60, costs and interest. The basis for this was said to be that the Press owed someone called Abdul Raoof (Raoof) a debt because it bought a plot LR 209/7123 from him and Raoof assigned the debt in a letter of April 7, 1978 to the Bank but the Press would not pay that debt, which amounted to that sum of Kshs 130,809.60, to the Bank.

The defence of the Press filed on September 17, 1980 with that it never received Raoof's letter, it was never indebted to Raoof before or by April 7, 1978 (the date of Raoof's letter) and Raoof was never indebted to the Bank in the sum of Kshs 130,809.60. The Press went on to deny, without prejudice to all that had gone before in its defence, that the letter assigned any debt and, if it did, that the Press had any notice of it. Suppose, however, the letter did assign that debt and the Press had notice of it, then, the Press pleaded, the Bank was estopped from claiming on it because it had waived its right on it when the Bank's advocates 'called up' Raoof to give his advocates authority to pay it the sum of Kshs 199,412 and, later, to agree the amount of the debt and Raoof never did either, so the Press, which had notice of those two matters, was led to believe and believed that the Bank did not consider Raoof's letter was an assignment of the debt. The Press's advocates told the Bank's advocates in October 1978 it was going to pay Raoof the money it owed him by October 1978, the Bank and its advocates never objected so the Press paid Raoof what it owed him in February 1979.

The issues before the judge on those pleadings were:

1. Did Raoof owe the Bank Kshs 130,809.60 by April 7, 1978?

2. Did the Press owe Raoof any sum by April 7, 1978? If so, was Raoof's letter of April 7, 1978 to the Press on assignment to the Bank of the debt of the press to Raoof?

3. If so, did the Press have notice of it?

4. And if it did, was the Bank estoped from claiming on the letter?

The Bank's witnesses were Mr Macharia and Mr Parmar who were advocates. Mr Macharia is employed by and Mr Parmar is a partner in the Bank's firm of advocates Hamilton, Harrison and Mathews. Those for the Press were Mr Manubhai and Mr Rajnikant Patel, the partners in the firm of advocates acting for the Press and Raoof in the sale. Their testimony and the submissions of the advocates for the Bank and for the Press, who were different from those who gave evidence, amounted, in my view, to anything but immediately clear answers to those issues, and I would that it were not so.

The learned judge believed the two Mr Patels (and, so far as I can tell, Mr Macharia and Mr Parmar).

He found that it was not clear from the language used in the letter that Raoof intended to assign this debt. The evidence of the two Patels advocates and the correspondence exhibited in the action did not support the Bank's contention that Raoof assigned this debt. He also made a finding that Raoof's letter was handed to this advocate, the Patels, and not the Press which had no notice of it even by June 29, 1982, which is when Mr Justice Todd delivered his judgment. Having answered those two issues (3 and 4) the learned judge declined to go into any other matters.

The four grounds of the Bank's appeal are:

1. The judge erred in law and in fact in holding that the letter of April 7, 1978 did not constitute an assignment of the debt.

2. The judge erred in overlooking the fact that the letter dealt with a specified fund.

3. The judge erred in law and in fact in holding that the letter had not been received by the respondent when it was addressed to them and sent for action by them to their advocates and agents who were admittedly acting for them in the conveyancing transaction and receipt of which is within the normal scope of such a transaction.

4. The judge further overlooked the fact that without the assignment the appellant could have obtained payment of the same money by a prohibitory order against the title of the debtor or by attachment of the sale price thereof in execution of its judgment against him."

The Press contends that the decision of Mr Justice Todd ought to be affirmed because, if there were a valid assignment of the debt, of which the Press had notice, the Bank is estopped from claiming on it because it waived its rights for the reasons set out in the last paragraph of its defence which I have paraphrased earlier.

Raoof employed Vohra & Vohra (the Vohras) as his advocates in some matters and the Patels in others. The Bank's advocates were Hamilton, Harrison & Mathews throughout this matter so I shall just equate them with the Bank.

The background to the issues was this. The Bank had judgment against Raoof for Kshs 107,057.94 from November 2, 1965 which he was liquidating by monthly instilments of only Kshs 400. (See Nairobi High Court Civil Suit 1845 of 1961). Then Raoof agreed to sell his interest in LR No 209/7123 to his neighbour, the Press, for Kshs 215,200 to which the landlord, the Kenya Railways Corporation did not object in its letter to the Patels, which was copied to the Bank, but alerted the Bank to the possibility of Raoof being able to pay off his debt to the Bank more quickly so it wrote to the Patels asking them if they acted for the Press and, if not, then who did, and what stage the transaction had reached?

Raoof signed the letter of April 7, 1978 which was addressed to the Press on that date. This is what he signed:-

"Dear Sirs,

RE: SALE OF LR NO 209/7123 NAIROBI TO US

I hereby irrevocably authorize you to effect the following payment for and on my behalf through Messrs Patel & Patel, Advocates, Nairobi and to deduct the same from the sale price of my above mentioned property:-

To City Council of Nairobi for unpaid rates, interest and water charges etc. Kshs 53,537.05

To Kenya Railways land rent and consent fee Kshs 4,865.00

To collector of income tax withholding tax 10% Kshs 30,000.00 Kshs 88,402.05

I also hereby irrevocably authorize you to settle the outstanding debt due to the Standard Bank Limited in respect of the matters mentioned in their letter of August 12, 1977 and make payment to the said Bank or their advocates and to deduct the same from the sale price.

I hereby confirm that all the above payments by you shall be until payment to you by me shall be a charge on the above mentioned property.

Yours faithfully."

This was not sent to the Press or the Bank for the moment but filed away by Mr Manubhai Patel. Its heading should be sale of LR No 209/7123 Nairobi to you and not to us.

To go back to that letter for the moment, however, it will be noticed that the Press is irrevocably authorized to settle the outstanding debt mentioned in the Bank's letter of August 12, 1977 by paying it to the Bank or its advocates and to deduct it from the 'sale price'.

And the Bank's letter reveals that Raoof owed the Bank Kshs 199,412 by that date, August 12, 1977, and it still did on April 7, 1978. This was set out again in the Bank's letter of June 19, 1978 to the Patels and the same letter notes that the Patels said they were acting for the press and Raoof in the sale of LR 209/7123 Nairobi, and presumably were on April 7, 1979 when they drafted the letter for the Press which Raoof signed.

Mr Manubhai Patel was on holiday in the Far East so when Mr Ragnikant Patel, received the letter of June 19, 1978 from the Bank's advocates he checked the file, saw Raoof's letter to the Press, photocopied it and sent the photocopy to the Bank the same day.

Mr Rajnikant Patel suggested the Bank should arrange for a fresh letter to be given by Raoof incorporating the precise amount he owed the Bank and then there would be no queries about the figures in the Bank's letter of August 12, 1977.

The Bank wrote to Raoof about June 26, 1978 (the date is unclear on my photocopy) asking him to tell the Patels to pay them so. The Bank had the wrong sum.

Instead, his other advocates, the Vohras, wrote to the Bank saying Raoof only guaranteed the Rehman Brothers Account No 1 and not their Account No 2 or that of Abdul Rehman. If that were true the balance due on Account No 1 was Kshs 40,917.65 on August 12, 1977. The Bank replied on August 2, 1978 saying it was calculating the balance due on the judgment, and that, because the suit was filed over thirteen years ago, this would take time.

The Patels wrote to the Bank on October 2 that year warning it that since the Bank and the Vohras had not resolved their differences they would pay out the proceeds of the sale to Raoof. Two days later the Bank asked the Patels to pay it what Raoof and the Vohras agreed Raoof owed the Bank (which was Kshs 40,917.65) but the Vohras denied they agreed he owed the Bank anything. The Patels replied the same day saying that they knew nothing of the agreed amount and unless the Vohras told them what it was by

return post, they would pay the balance of Raoof. The Vohras, according to the Bank, then agreed to the Bank contacting Raoof about this and he was asked to meet it but the Vohras denied they were acting for Raoof from November 20, 1978.

And on February 2, 1979 the Patels sent Raoof their cheque for Kshs 182,000 for the balance of the sale proceeds which Raoof confirmed was correct and receipted. Raoof left the country post hoc if not propter hoc.

The Bank then put on record the basis of their claim which was that (a) Raoof in his letter told the Press and the Patels he had assigned the proceeds of the sale of his property to the Bank which (b) told the Patels what was due, so(c) there was no need for Raoof or the Press to agree to such a payment, in fact, (d) any other course depended on the Bank's agreement which was not asked for and would never have been forthcoming.

It must be remembered that Raoof, the vendor, had to give a clear title and, at first, he could not do so according to the information the Managing Director of the Kenya Railways Corporation gave in his letter when he consented to the sale. There was a prohibitory order on this plot and I understood Mr Le Pelley to indicate that it was put there by the Bank. So Raoof could not convey his interest in it without paying off the claims in the letter of April 7, 1978 which he signed, and either he could not or would not meet them quickly enough for the Press. Later on, somehow or another, the number of the plot was changed in the registry and the prohibitory order and not transferred to it, so Raoof and the Press were longer prevented from accomplishing their transaction and Raoof could safely ignore or dispute the Bank's claim.

Mr Justice Todd said:

"It is settled that no particular form of words is necessary in order to effect an assignment if the intention is clear from the language used and an assignment can be absolute or by way of security."

And Mr Le Pelley, who appeared for the Bank in the High Court, and Mr Deverell, in the High Court and Mr Couldrey, in this court, for the Press accepted that is correct, as, indeed, it is. The learned judge then went on to say:

"However, nowhere in the letter …. are the words 'I hereby assign' or any use or variation of the words 'assign' made which I think would have put the matter beyond argument, but as I have said no particular form of words is necessary in order to effect an assignment if the intention is clear from the language used, and these last few words are important, as of course is Abdul Raoof's authority which is declared to be irrevocable, but is the intention clear from the language used? I am not satisfied that it is."

There were references in the High Court and in this one to sections 130 and 131 of the Transfer of Property Act 1882 of India, an applied Act, so the relevant portions of them had better be set out here:

"130(1) The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not"

Provided that every dealing with the debt or other actionable claim by the debt or other person from or against whom the transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception ……..

Illustrations

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131. Every notice of transfer of actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee."

And "actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent: section 3 (ibid).

Now under that Act in India it has been held that the benefit of a contract for sale and purchase of immovable property can be assigned: Bhabhootmal v Moolchand AIR 1943 Nag 266: and it is an actionable claim under the Act: See Mitra's Transfer of Property Act, 1882, 13th Edition 1978 page 29.

Against the evidence and the background to the April 7, 1978 letter, however, it seems to me that in reality Raoof was being lent those sums by the Press, whose security was a charge or charges on the property until it was transferred to it, and that Raoof's form of repayment of them to the Press was to be by the Press just reducing the sale price by those sums. Therefore, despite the use of the word irrevocable, this instrument in writing was a mere order for payment by Raoof to the Press and not an assignment. The first ground of this appeal fails. I will turn to the other matters which were argued or which I think arose on the law and the evidence or submissions on them. Also, Raoof's letter refers to payment from the sale price (twice) and not the proceeds of sale. It does not state the postal or residential address of the Bank, the transferee, which section 131 of the Act required. The residential address would be Kimathi Street, Nairobi. These are, however, matters which were not taken by the advocates and whether or not they are of any consequence should be left to another day. cf Fairways Travel Services (Nairobi) Ltd v Associated African Dock Enterprises (Kenya) Ltd [1971] EA 251, 253, 256 (CA-K).

What was raised was that, if Raoof's letter was an instrument in writing which assigned anything the Press owed him to the Bank, it did not assign all the Press owed him but only part of it which was, therefore, not an assignment of a debt but part of a debt.

This is covered by a local High Court decision, namely National House Limited v The Kenya Farmers Association (Co-operative) Limited, [1962] EA 463 (K). The facts in that case were that Dahlgren assigned to the plaintiff by letter to the defendants Kshs 25,000 of the total money from the second planting season 1958 (crop February 1959) from the defendant when it became available for payment. Rudd, Ag CJ remembered that it was governed by section 130 of the Act and said that there appeared to be conflicting decisions on whether or not part of a debt could be assigned under that section and he was at a disadvantage because he did not have access to all the relevant Indian judgments. He noted the definition of an actionable claim referred to a debt, not to part of a debt, and the section to the transfer of an actionable claim, not the transfer of part of an actionable claim.

He took account of the differences in the terms of section 25(6) of the Judicature Act, 1873 and section 136 of the Law of Property Act, 1925 from section 130 of the Act and went on to consider the effect of English decisions on the question. They include in Re Steel Wing Company Ltd, [1921] Ch 349, William Brandt's Sons & Co v Dunlop Rubber Co Ltd, [1905] AC 454 and Walter & Sullivan Ltd v Murphy & Sons Ltd, [1955] 1 All ER 843 and their combined principles led to Rudd, Ag CJ explaining that an action

on the same debt by a creditor cannot be split up into several actions on several parts of the debt without the consent of the debtor for it would be erroneous and wrong to subject the debtor to such turmoil. The creditor can only sue for part of a debt if he is prepared to waive the rest. When it comes to assignment of an actionable claim the assignor can only transfer the claim he had immediately before the assignment which was the whole debt. He could not assign one on more parts of the whole debt because he did not have one or more separate actionable claims on the whole debt. He held that all this applies just as much in Kenya as it does in England and under section 130 of the Act a single assignment of part of a debt is not a transfer of an actionable claim within the Act. National House Limited v Kenya Farmers Association has stood for nearly twenty three years. It was not the subject of an appeal. It is not binding on this court. If it is good law and the law in Kenya, and if Raoof were owed a debt by the Press his actionable claim was for the whole debt and he could not assign anything else under section 130 of the Act to the Bank. Thus that letter would be an assignment under the Act.

Was it an equitable assignment perfected by notice? Suppose the Act does not forbid or destroy equitable assignments or impair their efficiency and they still thrive. This was true after section 25(6) Judicature Act, 1973 came into force in England. Lord Macnagten in William Brandt's Sons & Co v Dunlop Rubber, [1905] AC 454, 461, HL (E).

But in India an equitable assignment must be by a written instrument to conform with the Act and there can be no valid assignment by parol though there can be a valid oral agreement to assign. Bengal Nagpur Railway Employees' Urban Bank v Seagar, AIR 1942 Pat 307. Sir Hari Singh Gour on the Law of Transfer in India and Pakistan, 7th Edition (1948) page 1835, 1838. There must be words of assignment or transfer and there must be particular fund or debt out of which the payment is to be made is one way of distinguishing an order for payment of money from an equitable assignment. It will not be valid until the debtor has in fact notice of the assignment. And in some jurisdictions in India in equity a defined part of a debt may be assigned. See Thakar Das Bhatia v Malik Chand, AIR 1953 Law 102, 103, 14 Lah 325; Official Liquidator, Travancore 1940 Mad 258, 265, 1939 MWN 1054; P Venkatapathy, AIR 1965 Andh, Pra 410, 414 Mitra's Transfer of Property, 1882 (ibid) page 1063.

There was no local authority on all this cited to either Mr justice Todd or this court but since the Act is an applied Indian one and because those principles and Indian authorities appear to be correct so, it might be said, they are the law as it stands in Kenya (though I doubt it). If this letter was a statutory or equitable assignment was there notice of this to the Press? Mr Justice Todd, it will be remembered, said 'No!'. This was based on the Patels' evidence in which they said the letter was never shown to the Press. Mr Rajnikant Patel, wrote, however, in the Patels' letter to the Bank of June 19, 1978, that the photocopy in it was of a letter of April 7,1978, which Raoof gave the Patels' client, the Press, and , if that is so, there could not be more direct notice. The Patels say that Mr Rajnikant was mistaken about this for Mr Manubhai Patel filed it and the Press never saw it. The Patels were, however, acting in the transaction relating to this plot for Raoof and the Press (which is contrary to the Law Society's recommendation or rule about this practice, and just see where it is landed everyone) and the letter is addressed to the Press. On this, with respect, I differ from the judge because notice was, it seems to me, given to the Press through its advocate of this assignment.

It was also given to the Bank by the sending of the copy which may have been a mistake on the part of Mr Rajnikant Patel but that does not invalidate it as a notice to the Bank of the assignment by Raoof of part of the debt of the Press to him and it was notice before the Bank filed this action against the Press which is all that is necessary so far as notice to the assignee is concerned.

While the action could not succeed under section 130 of the Act for the reasons I have advanced in this judgment already so, also, it could not succeed as an equitable assignment of part of the debt because the debt was a legal debt and because it could only be enforced by action in the name of the assignor and because all the other interested parties, if any, had to be joined as parties unless their participation could be dispensed with. The High Court could not adjudicate between them or otherwise. The debtor might have successive actions in respect of the same debt and they might lead to conflicting decisions over the same debt. National House Ltd v Kenya Farmers Association (ibid) 465 B C 466. See also Rays's The Transfer of Property Act (Act IV of 1882), 7th Edition, (1950), 701 paragraph 7. It is only if the

assignment is covered by the provisions of the Act that a legal chose in action can be sued upon by an assignee in his or its own name. See in Re Westerton, [1919] 2 Ch 104, 111-114.

Thus the appeal must be dismissed with costs. This means the notice of grounds for affirming the decision is redundant but since it was fully argued and its costs will be claimed an answer should be given to it.

The Press submitted that the Bank so conducted itself that even if it were entitled to this right it became inequitable to enforce it because the right was lost on the ground of estoppel or acquiescence, whether by itself or accompanied by delay.

The Bank's reply to this was an analysis of the evidence and the parties' correspondence which I agree, revealed that delay there might be but there was no waiver or acquiescence on the part of the Bank. It had no right of action against the Press until it refused to pay what the Bank demanded.

Add to that Mr Manubhai Patel's testimony that all along the Press thought the Bank had no right to any part of the debt owed by the Press to Raoof.

On all that I find that no estoppel arose. The Press sought to set it up so it had to show on the balance of probabilities it relied on the representation by conduct, Parmidner Singh Sagoo and Joseph Mascarenhas v Nevill Anthony Dourado and Maria Alba Aldonce Dourado, Court of Appeal Civil Appeal 24 of 1982, Nairobi March 4, 1983.

For these reasons I would reject the notice and award the costs of it to the Bank.

Nyarangi JA and Chesoni, Ag JA agree so those are the orders of the court.

Nyarangi JA. The judgment prepared by Kneller JA, which I have read in draft very adequately summarises the facts of the action.

Notwithstanding that no particular form of words is necessary in order to effect an assignment, the intention must be clear from the language and an assignment can be absolute or by way of security.

Having regard to the whole evidence, Raoof's letter is, at most, an assignment of part of a debt and therefore only a transfer of part of an actionable claim. The expression 'actionable claim' as defined in section 3 of the Transfer of Property Act, 1882 or India means a claim to an entire debt and not part of it and transfer of an actionable claim can only mean transfer of an entire actionable claim: National House Ltd v Kenya Farmers Association (Co-operative) Ltd [1962] EA 463. Raoof's letter was not on assignment under the Act. Even if there was notice, the assignment of part of the debt was no more than an equitable assignment of part of a legal debt enforceable by an action in the name of the assignor and all other interested parties.

I agree with Kneller JA that the appeal be dismissed with costs and the notice be rejected and that costs on it be awarded to the Bank.

Chesoni Ag JA. I had the advantage of reading the judgment of Kneller JA in draft. There was no dispute that Mr Raoof owed the appellant Bank some money and that there was money due to him from the respondent Press for a building he had sold to the respondent. He wrote a letter on April 7, 1978, in which he irrevocably authorized the press to effect the following payments on his behalf:-

a) To City Council of Nairobi for unpaid rates, interest and water charges Kshs 53,537.05

b) To Kenya Railways for rent and consent fee Kshs 4,865.00

c) To Collector of Income Tax withholding Tax at 10% KShs 30,000.00 Total Kshs 88,402.05

He also irrevocably authorized the respondent to settle his outstanding debt due to the Standard Bank

Limited.

While it is true no special words are required to create an assignment provided the intention is clear, the words of the letter by Raoof which is said to have created an assignment are too clear to be mistaken for what they are not. The author throughout used the words “I authorise you”. Thus he sanctioned the Press to act on his behalf in making the specified payments. What he did was to give authority to deal with and not assign the proceeds of the sale of his building.

I agree with Kneller JA that there was no assignment and consequently the appeal should be dismissed with costs. I also agree that the notice of grounds for affirming the lower courts decision is redundant and should be rejected and the costs of it awarded to the appellant.