IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Miller JJA)

CIVIL APPEAL NO. 21 OF 1980

BETWEEN

VINESH EMPORIUM GUDKA .....APPELLANT

AND

KESHAVJI JIVRAJ DODHIA.....RESPONDENT

JUDGMENT

Madan JA The appellant (defendant) and the respondent (plaintiff) had case loan dealings together, the plaintiff lending and the defendant borrowing money from him, which he repaid in varying sums from time to time.

The plaintiff in 1973 sued the defendant:

> "for the recovery of the sum of Kshs 14,900 being the balance amount due by the defendant to the plaintiff in respect of moneys lent and advanced by the plaintiff to the defendant at his request at Nairobi during the year 1971."

The plaintiff's advocate by his letter dated October 19, 1973 supplied details of the plaintiff's claim as consisting of two payments made to the defendant - Kshs 9,000 by cheque on May 27, 1971 and Kshs 41,000 cash on September 20, 1971. The repayments by the defendant were stated to be Kshs 2,000 and Kshs 28,000 by cheque on January 15 and 19, 1972 and Kshs 5,100 cash on a "date not recollected."

Defendant filed his written statement of defence. He denied owing the plaintiff the sum of Kshs 14,900 or any other sum at all; he admitted having had "some dealings of money transactions with the plaintiff during the years 1970, 1971 and 1972." A further averment in the defence asserted that the defendant paid whatsoever money was due to the plaintiff before the action was commenced, and all money transactions between the parties were fully settled during the year 1972. The defendant also attached to his written statement a detailed summary of the money transactions had by him with the plaintiff. The summary of account contained an item of interest Kshs 1,265 to the credit of the plaintiff.

The plaintiff filed an application for summary judgment under Order XXXV rule 1, supported by an affidavit sworn by him in which he deponed that he verily believed the defendant had no defence to the suit.

The defendant filed his own affidavit as well as an affidavit sworn by his accountant Mr GC Patel, in reply. The defendant deponed that he relied on the comprehensive defence lodged by him in the suit

which disclosed triable issues and a proper defence on the merits; that the detailed summary of accounts attached to the defence had been duly audited by Mr GC Patel.

Mr Patel who prepared the list of loans and repayments annexed to the defence, ie the summary of account, deponed that he was an accountant and auditor, and he had been preparing the accounts of the defendant's firm since the year 1963; that according to the books of account the plaintiff had some loan transactions with the defendant's firm and he had examined all entries of those transactions which showed that no balance was due from the defendant to the plaintiff.

The plaintiff filed an affidavit in reply to which he annexed the original of an acknowledgement of debt which, he deponed, had been given to him by the defendant to acknowledge his indebtedness to him in the sum of Kshs 14,900 being the amount of his claim; that this acknowledgement of debt was given to him sometime after the payment to him by the defendant of Kshs 5,100 in February, 1972 and upon his insistence that the defendant must pay the money. The acknowledgement read as follows:

> "Vinesh Emporium
>
> Your Ref Nairobi … 19 ……
>
> To
> Keshavji Jivraj Dodhia
>
> In regard to the loan of Kshs 50,000 (fifty thousand Kenya shillings only). We the undersigned Vinesh Emporium hereby confirm that we have paid you all moneys except the sum of Kshs 14,900 (fourteen thousand nine hundred Kenya shillings only) which amount we will pay you within the course of next few months.
>
> In regard to the previous loans we confirm that we have paid the same in full and only remaining to be paid to you is the same sum of Kshs 14,900 which on payment will settle the account between us.
>
> Vinesh Emporium
> (sg Defendant) Proprietor."

Chesoni J heard the application for summary judgment. Saying that the acknowledgement of debt to pay the claim amount of Kshs 14,900 was not unequivocal, and it did not make the case clearly conclusive on either side, he gave the defendant unconditional leave to defend. Before proceeding to consider the substantive appeal before us, I would set out the following excerpts from the ruling of Chesoni J for their clarity, correctness and felicitous language:

> "It would be impossible for anyone to form a conclusive opinion in favour of any of the parties on the merits of the defence filed with its attached summary of payments received and repayments made unless the defendant's books of account have been examined … If leave to defend were to be granted subject to the defendant paying money into court, the defendant would be ordered to pay into court only the amount claimed. It is not usual, and, in my opinion, it would be improper, where conditional leave to defend is given, to order the defendant to deposit in court a sum of money which includes an element of costs …
>
> On the question of examining the defendant in court, while this is in order, this power should, in essential for a satisfactory disposal of the suit, eg where the only doubt on giving judgment for the plaintiff could possibly be easily resolved by examining the defendant in court in an application where affidavits or oral evidence given have shown that there are no triable issues or merits in the defence. If the practice diligently and cautiously applied it could lead to trial of questions of fact and indirectly to trial of the suit upon affidavits which is not what was intended by Order XXXV. In an application for summary judgment the court is not required to deal with the merits and comprehension of the case …."

I said in *Mugambi v Gatururu* [1977] EA 196 at p197:

> "I concur in the view that if the practical result of imposing a condition of payment into court or giving security would unjustly deprive the defendant of his right of laying his defence before the court then it ought not to be imposed. Such practice should be very sparingly resorted to by the court … No person should be shut out of court and his rights not litigated unless it is in the interest of justice to do so."

The trial of the action moved over to Hancox J. He entered judgment as prayed for the plaintiff. The defendant has appealed.

The plaintiff's evidence in court ran much as the averments in his plaint, his advocate's letter dated October 19, 1973, and his two affidavits already referred to.

The learned judge said in his judgment that the plaintiff impressed him as a straightforward witness who had given evidence as to the loans and repayments clearly and satisfactorily; the plaintiff's account was that the defendant had promised to pay the full amount by the end of February, 1972. As the defendant did not have the money the plaintiff demanded a promissory note or a letter. Accordingly the defendant gave him an aerogram in his shop bearing his letter head and signed that which the plaintiff wrote, ie the acknowledgement of debt which, the plaintiff said, he read to the defendant before signing that the writing supported the plaintiff's story. The running record of the money lent and repaid from time to time which was kept by him on a piece of paper was then destroyed as it was superseded by the acknowledgement of debt.

The learned judge said that the defendant's case, however, was that all amounts he owned the plaintiff, including Kshs 1,265 interest outstanding, had been repaid by January 21, 1972; that the defendant being partially illiterate in English, was in the habit of signing head note paper in blank, and that the plaintiff seeing these papers lying around, had abstracted one of them and written the letter above the defendant's signature in his absence. The defendant admitted quite candidly in his evidence that the signature on the acknowledgement of debt a very fair and impartial witness, but he considered Mr Patel could not say whether the entries in the defendant's oral testimony.

The remaining defence witness was Mr ZR Shah, who testified that he had seen the acknowledgement of debt before in blank but signed, in the plaintiff's possession between 1972 and 1973. The plaintiff asked his advice whether, if he was owed some money, he could "write it on the paper?" Mr Shah told him it would amount to a forgery. He did not think about the matter until 1976 when he told the defendant during a conversation apropos the defendant's indebtedness to the plaintiff, that he had seen acknowledgement of debt, and "if you need any help, I can be a witness."

Mr Shah and the plaintiff had not been on friendly terms as a result of some dealings between them. From Mr Shah's evidence it seemed that he was himself in the habit of signing important official documents in blank. He implied that the plaintiff had taken these documents from where they were left and inserted the unauthorised particulars which appeared therein.

The learned judge's assessment of the defendant was that he found him to be a most unsatisfactory witness. Understandably, the learned judge also pointed out, first, that the defendant said all the signatures with which he had subscribed blank papers were in the same position on the paper - how could he know how long the letters or writing should be secondly, that it was a surprising material in a document which was already signed; thirdly, that it was impossible to accept that the plaintiff, having had long service with a bank, would be so naive as to ask Mr Shah's advice in the way it was said he did; fourthly, the defendant could not give any explanation of how the interest of Kshs 1,265 was made up or the rate that was charged.

The appearance of the book of entries must be honest, no suspicion of false dealing must be apparent. But the trial court's determination of this must be final. *Sarkar on Evidence*, 10th Ed p 386. In *Ganga Persad and Another v Inderjit*, 23 WR 390 ATP 391, the privy council said that books being at most

corroborative evidence, the mere general statement of a banker, where the fact of payments was distinctly put in issue, to the effect that his books were correctly kept, was not sufficient to satisfy the burden of proof that lay upon him, particularly as he had the means of producing better evidence.

The plaintiff said he never charged the defendant interest. Difficult though this may be to believe, the defendant's own statement of account supports the plaintiff. Why only this one lonely item of interest from 1970 to 1972. It must have been put in to square the statement of account on the credit and debit sides. True, the plaintiff did not have any books of account. The defendant's books were equated with his oral testimony. On the matter of credibility the plaintiff and the defendant stood at par before the learned judge.

It was a fair criticism made by the defendant's advocate that the plaintiff did not begin by canvassing his claim against the defendant on the acknowledgement of debt, also that it being undated was quite valueless to affix the amount of the defendant's liability on any particular date. The defendant's admission that the signature on that document is his, to that extent, the document is genuine. If the remainder of the writing is a forgery, then it is an accusation of fraud made against the appellant. It is no light accusation. It is a serious accusation which must be strictly proved. The wretched attempt to prove it by the pathetic evidence of Mr ZR Shah was a dismal failure. In addition the plaintiff had the running account on a piece of paper. He also explained, an explanation which the learned judge accepted, why the acknowledgement of debt was undated, the plaintiff was no more than foolish in tearing up the piece of paper of the running account because it was superseded by the acknowledgement of debt.

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion. O'Connor P in *Peters v Sunday Post* [1958] EA 424 at p 429.

> "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, would not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witness, could not be sufficient to explain or justify the trial judge's conclusion."

Per Lord Thankerton in *Watt v Thomas* [1947] AC at p 487.

I would agree with the appellant's advocate that the judgment of the High Court contains here and there a passage which put the plaintiff undeservedly on a pedestal, but I am not persuaded that I should dissent from the judgment of the High Court.

The learned judge referred to Chesoni J's observation that the acknowledgement of debt was, as undated, not sufficiently unequivocal to provide that degree of conclusiveness as is required for that summary and very effective remedy under Order XXXV and said that having heard the evidence, he was perfectly satisfied with the plaintiff's evidence on the point and he believed him. He rejected the defendant's story where it was inconsistent therewith. I would dismiss the appeal with costs. Law and Miller JJA agreeing, it is so ordered.

Law JA. I have had the advantage of reading in draft the judgment prepared by Madan JA in which the facts relating to this appeal are fully set out.

I find the business methods of the members of the community to which the parties to this appeal belong quite baffling. Apparently they lend money to each other without making any provision for interest, although it seems to be common ground that the lender expects some interest, presumably reasonable interest - to be paid when the debt is repaid. We were assured by both the learned advocates engaged in this appeal that this is so. It also seems to be the practice, at least with the appellant and his witness Zaverchand Ramji Shah, for businessmen, members of their community, to sign blank letters, bearing

their letterheads, and then leave them lying about on their tables in their premises so that they can be filled in by friends and business acquaintances with matter of which the signatory may well be ignorant. For instance, Mr Shah was shown two letters, admittedly signed by him, containing matter as to which he professed ignorance. His explanation was that someone else had filled in the body of the letters without his knowledge and that (to quote from his evidence):

> "I signed it in blank as I have done many documents and put it in the tray and he may have taken it."

In the same way the respondent Mr Dodhia relied in support of his claim on a letter, undated, on paper bearing the appellant's letterhead and admittedly signed by him, acknowledgement, is however in Mr Dodhia's handwriting. Mr Dodhia deponed that he wrote this letter on paper supplied by the appellant who then signed it. The appellant's testimony was that he often signed letters in blank which could be filled in above his signature by three of his friends, including Mr Dodhia and that Mr Dodhia filled in the acknowledgment without his knowledge. According to the appellant, this letter was a false document. This conflict of evidence, and the other questions of fact in dispute in the suit, were decided by the learned judge in favour of the respondent in the suit, because he found the respondent to have been an honest and straightforward witness, whereas, in his view, the appellant was most unsatisfactory witness.

An appellate court will be slow to interfere with a trial judge's findings of fact, but is not bound to follow them if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally, see the judgment of Sir Clement de Lestang VP in *Selle v Associated Motor Boat Company* [1968] EA 123, at page 126.

In this connection, Mr DM Khanna for the appellant submitted that the learned judge erred and misdirected himself in preferring the evidence of the respondent, which was supported only by a document of dubious authenticity, to that of the appellant, who produced his properly kept and audited books of account in support of his defence that he had repaid his debt in full. The appellant's accountant, Mr GC Patel, deposed that he had prepared the accounts from the particulars contained in the appellant's account. He was not required to do so. All he was required to do was to put the appellant's accounts into proper form, without checking the accuracy of the figures in those accounts. On this point, the learned judge, having described Mr Patel as a fair and impartial witness, commented that the figures produced by Mr Patel had their source in the appellant, and had the same weight as the appellant's testimony. I respectfully agree. The appellant's books of account were admissible in evidence, under section 37 of the Evidence Act. Mr Patel did no more than alter their form. He did not carry out an audit, and his evidence does not add anything to that of the appellant as to the weight to be attached to the accounts.

As regards the alleged letter of acknowledgement, the appellant's case is that this was a false document, made without his authority by the respondent. The learned judge did not believe this, on a balance of probabilities. He could have required a higher standard of proof. The respondent was in effect being accused of fraudulent conduct, and allegations of fraud must be strictly proved, more than a mere balance of probabilities is required, see *RG Patel v Lalji Makanji* [1957] EA 314. I do not see how, in this light, the learned Judge's finding that the letter of acknowledgement was not a false document could now be challenged. In my view, the decision the subject of this appeal involved pure questions of fact, and far from interfering with the learned judge's findings of fact, I respectfully agree with them. I would dismiss this appeal. I agree with the orders proposed by Madan JA.

Miller JA. I have had the benefit of reading in draft the judgment of Madan JA in this appeal. I agree with it. As I see the litigation whilst the evidence bristles with obvious improbabilities on the part of the experienced and established money-business personalities in the entire case, the net result had to be belief or otherwise of one side as opposed to the other. Even if I had had the opportunity of seeing and hearing the witness, I very much doubt that I may have arrived at a conclusion different from that of the learned trial judge. Accordingly, and for my part, the appeal should be dismissed.

Dated and delivered at Nairobi this 25th day of March , 1982.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR