Rafiki Microfinance Bank Limited v Youth Enterprise Development Fund Board (Civil Appeal E222 of 2022) [2024] KECA 239 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 239 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E222 OF 2022

MSA MAKHANDIA, P NYAMWEYA & JM MATIVO, JJA

MARCH 8, 2024

BETWEEN

RAFIKI MICROFINANCE BANK LIMITED ..... APPELLANT

AND

YOUTH ENTERPRISE DEVELOPMENT FUND BOARD ..... RESPONDENT

(An appeal from the Ruling of the High Court of Kenya (Majanja, J.) dated 11th November, 2021 and Judgment of the High Court of Kenya at Milimani (Tuiyott, J.) dated 5th October, 2020 in Commercial & Tax Civil Suit No. 384 of 2016)

JUDGMENT

1. A perusal of the record of the proceedings in the High Court shows that this appeal is from both the ruling and order dated 11th November 2021 by Majanja, J as well as the judgment and decree dated 5th October 2020 by Tuiyott, J The notice of appeal on record equally is said to be against the ruling and order as well as the judgment and decree aforesaid. The said notice of appeal dated 18th November 2021 was lodged on 23rd November 2021. It is apparent that the application that resulted in the impugned ruling was filed after the judgment and decree of the trial court had been delivered. The ruling was in respect of an application that sought to review the said judgment and decree. The reason we have stated all the foregoing is that the respondent has in its submissions suggested that there was no appeal against the judgment and decree of the High Court but rather what is before us was an appeal against the ruling and order and that is true. It is true since in our view, the judgment and decree having been delivered on 5th October 2020, and the appellant was desirous of appealing the decision, then it ought to have filed notice of appeal within 14 days of the decision as required by our rules. But as already stated the notice of appeal was filed on 23rd November 2021, a year later, similarly the record of the appeal ought to have been filed 60 days later. But record of appeal was again filed on 23rd November 2021, also a year later. See rules 77 and 84 of the *Court of Appeal Rules*. This then begs the question

whether the appeal against the judgment and decree is properly before us. We shall revert to this issue later in this judgment.

2. The genesis of the appeal was a suit instituted against the appellant by the respondent by way of a plaint dated 21st September 2016. The cause of action revolved around the alleged breach of a Deed of Guarantee dated 26th November 2012 ("Deed of Guarantee"), by the appellant which had been entered into between the respondent and the appellant. By that Deed of Guarantee, the respondent advanced to the appellant a loan of ksh 100,000,000.00 for onward lending to persons and institutions. The key term of the Deed of Guarantee was that the appellant, as the participating financial institution, was to provide a Bank Guarantee equivalent to ksh 100,000,000.00. In pursuance of that covenant, the appellant provided a Bank Guarantee from Chase Bank Limited. The Chase Bank was however,subsequently placed under receivership by the Central Bank of Kenya forcing the respondent to demand that the appellant furnishes a fresh Deed of Guarantee from another financially sound institution. However, the appellant failed, neglected and or ignored the demand.

3. Pursuant to the above breach, the respondent issued a Notice of termination of the Deed of Guarantee and recalled the entire loan of ksh 100,000,000.00, the accrued interest of ksh 342,693.00 and utilization fee on 30th June, 2016. This according to the respondent was based on a term of the Deed of Guarantee that specified that the sum due and owing would become payable to the respondent within seven (7) days of the termination taking effect, failure to which the same would attract a penalty interest at the rate of 6% per annum above the Central Bank of Kenya rate until payment in full. Failure by the appellant to comply with notice forced the respondent to institute a suit seeking to recover the ksh 100,342,693.00, and interest at the rate of 6% p.a above the prevailing Central Bank of Kenya prime lending rates as at 8th August 2016 till payment in full and the costs of the suit.

4. The suit was defended by the appellant through the written statement of defence dated 14th October 2016 on grounds that the Chase Bank guarantee was to remain in force up to and including 1st January 2018.

5. Furthermore, the appellant pleaded that at that time, it was undergoing operational and financial turbulence, which was reminiscent in the financial market at the time. The appellant denied the allegations of the respondent that it was dismal in its disbursements of the amount advanced and stated that it had utilized more than 90% of the funds invested both in loans and guarantees. As a consequence of these averments, the appellant stated that the termination of the Deed of Guarantee was premature and impulsive, as it had been and continued to be in compliance with the terms thereof. Finally, it pleaded that even if the termination was to be found to be valid, the respondent was not entitled to the amount demanded as the Deed of Guarantee provided that the respondent was to provide covers on defaults of start-ups at 70% and for established premises at 50%.

6. After hearing the suit, the trial court (Tuiyott, J (as he then was), found that the respondent had proved its case and entered judgment as prayed in the plaint. Dissatisfied with the said judgment and decree, the appellant filed an application to review the judgment and decree on the grounds that it had discovered new evidence in its systems and records showing that it had actually offered support and cooperation after the respondent issued to it the notice of termination. That it severally engaged the respondent in the accounts reconciliation, which automatically negated the averment by the respondent that it breached the terms of the Deed of Guarantee.

7. The application was opposed by the respondent who in a replying affidavit stated that all the materials allegedly discovered by the appellant were always in its possession as admitted in the supporting affidavit of Ken Obimbo to the application. That further, the appellant had not shown that the information was not in its possession at the time of filing or hearing of the suit and that despite the

exercise of due diligence it could not adduce it at the hearing or prior to delivery of the judgment. It was the respondent's further response that the newly discovered evidence was immaterial to the appellant's defence as there was an initial breach of the Deed of Guarantee as admitted by the appellant in its letter dated 22nd July 2016.

8. Majanja, J found that the application seemed to be an attempt by the appellant to re-litigate the suit afresh and thus dismissed it with costs to the respondent.

9. It is after this ruling that the appellant approached this Court on appeal attacking both the judgment and decree and the ruling and order aforesaid, on the grounds that the trial court erred in law and in fact by: relying on a letter of response from the appellant to the respondent as an admission of breach of the Deed of Guarantee; holding that the letter formed part of an admission of liability thereby finding the appellant in breach of the Deed of Guarantee; failing to find that the letter in fact remedied the situation that was ongoing and meant that the Deed of Guarantee was still in force; failing to take judicial notice that at the time the appellant was experiencing financial difficulties that engulfed the entire banking sector; holding that the respondent satisfied the requirements for termination of the Deed of Guarantee; failing to find that the respondent failed to send the second notice of termination which was required by the Deed of Guarantee; failing to take into consideration the amount of money that had been utilized by the appellant which was admitted by the respondent at the time of termination of the Deed of Guarantee; holding that the appellant should pay the full amount of the Deed of Guarantee which was ksh 100,000,000.00 when it had already utilized ksh 40,000,000.00; and lastly, invalidating the Deed of Guarantee and declaring the appellant liable to refund the whole amount in the Deed of Guarantee.

10. The appeal was heard on a virtual platform by way of written submissions with limited oral highlights.

11. Prof. Ojienda, Senior Counsel ("SC"), teaming up with Ms. Musando, learned counsel appeared for the appellant whilst Mr. Morara, learned counsel appeared for the respondent. Prof. Ojienda condensed the appeal into four broad grounds: firstly, that the letter of response should not have been construed as an admission of breach of the Deed of Guarantee; secondly, that the respondent did not satisfy the requirements for termination of the Deed of Guarantee; thirdly, the trial court failed to take judicial notice of the significant financial constraints that afflicted the banking sector at the time; and lastly, that the trial court failed to take into consideration the amount of money that had already been utilized by the appellant.

12. On the first issue, SC submitted that the trial court misdirected itself in construing the letter of response as an admission of liability.

    He relied on the case of *Choitram v Nazari* [1984| KLR 327, for the proposition that admissions have to be plain and obvious. They must be obvious on their face without requiring a magnifying glass to ascertain their meaning. Based on the foregoing, counsel submitted the letter of response which the court treated as an admission of breach of Deed of Guarantee did not meet the threshold for admissions.

13. On the second ground, the appellant submitted that the termination of the Deed of Guarantee required proper notice to be served on the respondent. There was, a requirement in the deed of guarantee that two notices were required to be issued and served on the appellant by the respondent. It was however, evident that only one notice was issued and served by the respondent.

14. On the third ground, SC submitted that the situation at the time was that the financial sector was experiencing liquidity problems which the trial court failed to take judicial notice of. He relied on the case of *Gupta v Continental Builders Ltd* (1976-80) 1 KLR 809, for the proposition.

15. On the last ground, it was submitted that the trial court failed to take into account that a sum of ksh 40,000,000.00 out of the sum of ksh 100,000,000.00 had been expended by the appellant on behalf of the respondent. The trial court however entered judgment for ksh 100,342,693.00 without consideration of the amount utilized at the time of termination of the Deed of Guarantee and despite the respondent's admission to the utilization of the said amount in its plaint. The amount that had been utilized ought to have been taken into account in the calculation of the amount to be refunded to the respondent.

16. Dealing with the appeal on the ruling and order, Ms. Musando submitted that in as much as Majanja, J exercised his discretion in dismissing the application for review, he exercised that discretion wrongly and whimsically.

17. Counsel for the respondent in opposing the appeal submitted that a reading of the grounds of appeal, reveal that they are against the judgment and decree and not the ruling and order. The respondent submitted that the only appeal that would properly lie before this Court is from the ruling and order. That further, the appellant's submissions were entirely against the judgment and decree and not the ruling and order which crystalizes the point that the appeal is a barefaced attempt by the appellant to have a second bite at the same cherry. Whilst relying on this Court's decision in Kisumu Civil Appeal nos 60 and 62 of 2017 - *Otieno, Rogot & Co. Advocates v National Bank of Kenya Ltd*, the respondent submitted that once the appellant filed an application for review, it lost its right to appeal against the judgment and decree.

18. The respondent further submitted that even if it was to be assumed that the appeal is against the ruling and order, a look at the provisions of Order 45 of the *Civil Procedure Rules* and Order 45(3)2 show that the burden of proof was on the appellant to prove that the alleged new evidence was not within its knowledge despite the exercise of due diligence. While relying on the case of *Rose Kaisa v Angelo Mpanju* [2009] eKLR, the respondent submitted that there was no demonstration of due diligence. Further and in any case, the said new evidence was not material to the case and would not have changed the judgment and decree as the email correspondences the appellants sought to rely on, occurred in the year 2017, way after the suit had been filed which was a clear indication that the appellant was attempting to remedy the breach of the Deed of Guarantee by purporting to provide co-operation when it was too late. The emails did not in any way cure the initial breach of the terms of the Deed of Guarantee executed by the parties. Similarly, the alleged final report was prepared in 2017 way after the appellant had already breached the terms of the Deed of Guarantee. The respondent thus submitted that the alleged new evidence was immaterial and would not in any way have affected the trial court's judgment. Counsel therefore urged us to dismiss the appeal in its entirety and award costs to the respondent.

19. A first appellate court is required to subject the whole of the evidence tendered in the trial court, to fresh and exhaustive scrutiny and reach its own conclusions about it, bearing in mind however, that it did not have the opportunity to see and hear the witnesses firsthand. This obligation was stated in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123. See also *Peters v Sunday Post Limited* [1958] EA 424.

20. The singular issue for determination is whether we have jurisdiction to entertain the appeal on the ruling and order as well as the judgment and decree delivered at different times in the same appeal and thereafter make a determination on either.

21. When the appellant lost the case in the trial court, it preferred an application for review of the judgment and decree on grounds that there was new material evidence that had not been brought to the attention of the court that needed to be considered.

22. Order 45 rule 1(b) of the *Civil Procedure Rules*, under which the application was made provides *inter alia*:

(1) Any person considering himself aggrieved -

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed,and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

23. The foregoing provisions are based on section 80 of the *Civil Procedure Act* which states as follows:

" Any person who considers himself aggrieved -

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

24. It is apparent from the foregoing that the review remedy is only available to a party who though has a right to challenge the decision in question by an appeal, is not appealing, or to whom there is no right of appeal. In other words, a person cannot exercise both the right of appeal and review at the same time.

25. In the case of *The Chairman Board of Governors Highway Secondary School v William Mmosi Moi* - Civil Application no 277 of 2005 this Court had this to say:

" The Board took an active part in giving instructions to the advocate on the various matters the advocate was pursuing before the superior court. In particular, the Board gave instructions that an application be filed for review of the ruling and it is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances, the options available to the Board were exhausted when the application for review was determined by the superior court and it is doubtful whether the intended appeal would be valid even if it was filed..... However, upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other".

See also *Orero v Seko* [1984] KLR 238.

26. Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the rules are subject to the provisions of the *Civil Procedure Act* under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision upon which the review application was anchored on appeal, would in our view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 Rule 1 were meant to assist genuine litigants and not parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. It is our view that the wording of the provisions of Order 45 Rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of "any person considering himself aggrieved". An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. However, to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in our view, to an abuse of the process of the Court. It would also contravene the overriding objectives as provided under sections 1A and 1B of the *Civil Procedure Act* whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court's seal of approval to persons who wish to play lottery with judicial process.

27. In this case, the appellant having sought to review the judgment and decree cannot now purport to appeal against the same after its review application was dismissed. It can only appeal against the ruling and order on its application for review made on 11th November 2021. Further and as we have already demonstrated, the notice and record of appeal in respect of the impugned judgment and decree were both filed way out of time.

28. We have said enough to demonstrate that the appeal against the judgment and decree before us is incompetent. We believe that the proper appeal before us, is the appeal against the ruling and order of Majanja, J dated 11th November 2021 and that is the appeal we shall consider.

29. The application before the trial court was for review of the judgment and decree of Tuiyott, J (as he then was). According to the application, the new material evidence sought to be introduced had they availed during the trial, would have resulted in the trial court making a different view. There is a contra argument by the respondent that we have already set out elsewhere in this judgment. In application for review, the court exercises discretion.

30. We have therefore to determine whether the trial court exercised its discretion properly when it dismissed that application. In the case of *Parliamentary Service Commission v Martin Nyaga Wambora & Others* [2018] eKLR, the Supreme Court while dealing with the issue stated:

    31. Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

        i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.

        ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re- argue his/her application.

iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercising discretion and:

a. as a result, a wrong decision was arrived at; or

b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice."

31. Having carefully considered the record and on the basis of the foregoing injunctions, we see nothing to fault the trial court's exercise of discretion. The trial court was of the view that the documents forming the basis of the application were at least available to the appellant between 2016 and 2017 during the pendency and the hearing of the suit hence the question is whether it exercised due diligence. It was clear that the evidence having always been in the appellant's possession, it was obvious that had it exercised due diligence, it would have easily brought it on board. However, it is apparent that the appellant did not live to this expectation. It can only blame itself for the omission. See *Rose Kaisa v Angelo Mpanju* (*supra*). The trial court further noted that the evidence would not have cured the breach of the Deed of Guarantee and to that extent it was irrelevant. This was a correct observation and we have no reason to fault it. In fact, what was before the court was a ploy to re-litigate the suit through the back door. The appellant after discovering that he had lost its case majorly on failure to show how it had remedied the situation once a notice was served, sought to do so through the application belatedly. Review is not meant to grant an applicant a second bite at the same cherry. It is not an opportunity for an applicant to re-litigate its case.

32. We find nothing to suggest as already stated that the trial court improperly exercised its discretion. The upshot then is that this appeal fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J MATIVO

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR