Johmat Distributors Limited v Central Bank of Kenya & 3 others (Civil Appeal E263 of 2021) [2024] KECA 1178 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1178 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E263 OF 2021

F TUIYOTT, SG KAIRU & GWN MACHARIA, JJA

SEPTEMBER 20, 2024

BETWEEN

JOHMAT DISTRIBUTORS LIMITED .... APPELLANT

AND

CENTRAL BANK OF KENYA .... 1ST RESPONDENT

GIRO COMMERCIAL BANK LIMITED .... 2ND RESPONDENT

ALEX REBIRO NGUGI ALIAS ABA MPESHA T/A MPESHA ENTERPRISES .... 3RD RESPONDENT

JIGNESH DESAI .... 4TH RESPONDENT

(Being a partial appeal from the Judgment of the High Court of Kenya at Nairobi (Odunga, J.) (as he then was) dated 18th December 2019 in HCCC NO. 204 of 2004)

JUDGMENT

1. At the outset, it is paramount to state that this appeal was withdrawn against the 2nd, 3rd and 4th respondents. Learned counsel Mr. Maina for the appellant confirmed that the issues in contest do not affect the 2nd, 3rd and 4th respondents, as these parties together with the appellant had recorded a consent in another appeal, which fact was conceded to by learned counsel Mr. Chacha Odera appearing for the 1st, 2nd, 3rd and 4th respondents. On that basis, we marked the appeal as withdrawn against the 2nd, 3rd and 4th respondents with no orders as to costs. This appeal, therefore, proceeds between the appellant and the 1st respondent.

2. By a plaint dated 17th April 2004 and further amended on 27th February 2004, the Central Bank of Kenya (the 1st respondent) sued Giro Commercial Bank Limited (the 2nd respondent), Jignesh Desai (the 3rd respondent), Alex Rebiro Ngugi alias Aba Mpesha T/A Mpesha Enterprises (the 4th respondent) and Johmat Distributors Limited (the appellant) in HCCA No. 204 of 2004, and sought:

a declaration that the 2^{nd,} 3rd and 4th respondents and the appellant are liable for the loss suffered by the 1st respondent; the sum of Kshs. 205 million be paid by the 2nd respondent as the constructive trustee of the 1st respondent; and/or in the alternative, judgement be entered jointly against the 2nd 3rd and 4th respondents and the appellant in the sum of Kshs. 205 million for their separate involvement in the fraudulent acquisition and transfer of the proceeds from the Treasury Bonds rightfully belonging to the 1st respondent; interest at bank rates from the date of payment of the said amount until payment in full; costs of the suit; and any other relief the court deemed fit to grant.

3. The 1st respondent pleaded that under the Internal Loans Act, Cap 420, acting as the Government's agent, it was mandated to administer public debt. In discharge of its functions, it established an electronic system for the administration of public debt both for issuance and secondary trading known as Central Depository System (CDS). It was stated that through the CDS, members of the public could purchase and trade in Government securities conducted through electronic book entries.

4. On or about 29th July 2002, the 2nd respondent, through its Westland's Branch, opened a bank account for the 4th respondent. It was alleged that on 7th February 2003, the 2nd respondent received a credit of Kshs. 95,420,160/= by way of transfer by order of Dyer & Blair Brokers through Stanbic Bank Limited in its (4th respondent) account. The aforementioned amount was withdrawn by the 4th respondent using bank cheques of different values and within 7 days, the balance in its account then stood at Kshs. 755, 174/=.

5. Several months passed by and on 24th February 2003, the 4th respondent's account was once again credited with the sum of Kshs. 90,140,460/=. The sum was utilized by either being withdrawn in cash and/or paid to other bank accounts using banker's cheques out of which, it was alleged, that the appellant was a beneficiary of Kshs. 15,000,000/= paid into its fixed account domiciled with the 2nd respondent. It is these alleged fraudulent actions that the 1st respondent alleged caused it a loss of Kshs. 205 million.

6. Each of the named defendants filed their respective defences and counterclaims. However, as we have noted that this appeal involves only the appellant and the 1st respondent, it is prudent that we consider the appellant's defence and counterclaim only. The appellant's defence and counterclaim was dated 4th June 2007. It denied being privy or a party to the alleged fraudulent acts or transactions. It was averred that it opened, operated and maintained accounts with the 1st respondent in an ordinary banker-customer relationship. None of its resources/funds were obtained fraudulently as alleged, but lawfully from its business operations.

7. In its counterclaim, the appellant averred that the 1st respondent acted unlawfully by obtaining orders which caused it loss. The appellant particularized the loss caused to it by the 1st respondent to be, among others, loss of interest on the deposits seized by the 1st respondent without lawful cause, which in turn caused loss of business. The appellant prayed that it was entitled to general and aggravated damages and loss of interest on the deposit from 22nd July 2003.

8. On 3rd March 2020, the appellant and the 1st respondent signed a consent to the effect that the Kshs. 14,000,000/= deposited in court belonging to the appellant, be released to it. Therefore, the common ground is that Kshs. 14,000,000/= was no longer subject of litigation between the parties as it had already been released to the appellant.

9. In dismissing the 1st respondent's case against the appellant, the learned Judge (Odunga, J.) (as he then was) found that the case against the appellant was based merely on suspicion. Regarding the appellant's counterclaim and claim on loss of interest, the trial court found no merit in the claim, and altogether dismissed the appellant's claim against the 1st respondent.

10. After holding that the appellant was not entitled to the alleged loss of interest of the withheld Kshs. 14,000,000/=, the appellant is now before us raising 5 grounds of appeal in its Memorandum of Appeal dated 12th May 2021. From the oral and written submissions made by the respective learned counsel, we have collapsed the grounds of appeal into the following 3:

    a. That the learned Judge erred in law and in fact in dismissing the appellant's counterclaim despite there being enough supportive evidence.

    b. That the learned Judge erred in law and in fact in denying the appellant interest on the amount attached at the behest of the 1st respondent by failing to consider and appreciate:

        i. That the said sum was in a fixed deposit account earning interest for the appellant and certificates to that effect were produced during the hearing.

        ii. That the 1st respondent had given an irrevocable undertaking vide its application dated 15th June 2006 to pay interest on the money attached in the event its case did not hold against the appellant.

        iii. That the length of time the money was held and the amount involved should and ought to earn the appellant a huge sum of money.

    c. That the learned Judge erred in law and in fact in failing to exercise his discretion properly by refusing to award costs to the appellant taking into consideration the tit took to defend the matter both in the Criminal and the Civil Divisions.

11. Accordingly, the appellant prayed that:

    i. This Court be pleased to partially set aside the learned Judge's judgement that declined to award interest and costs to the appellant.

    ii. This Court be pleased to enter judgement in favour of the appellant for interest on the sum of Kshs. 14,000,000/= at commercial rate compounded from the date the sum was seized to the date the same was released to the appellant.

    iii. Costs of the suit.

12. We heard this appeal via this Court's GoTo virtual platform on 30th April, 2024. Going first, Mr. Maina gave a history of the dispute between the parties beginning with the criminal proceedings against the appellant which were eventually dismissed. He told us that upon acquittal of the appellant on 9th June 2006 by Muchelule, J. (as he then was), the 1st respondent was directed to refund the frozen monies belonging to the appellant. Instead of complying, the 1st respondent filed an application dated 12th June 2006 before the High Court seeking injunctive orders against the 2nd and 3rd respondents restraining them from dealing with, or disposing off, the funds; and that to compromise the application, it (1st respondent) gave an undertaking to pay damages in respect to the appellant's frozen sum of Kshs. 14,000,000/=.

13. The appellant contended that at the time when the attachment of its funds was done, it was not a party to the suit in the High Court but was only joined by an order of Kasango, J. on 12th June 2006. The appellant is aggrieved that even after being exonerated of any wrongdoings in relation to the transaction giving rise to this appeal, it was not awarded interest for the 14 years its money amounting to Kshs. 14,000,000/= was being held. Counsel submitted that the learned Judge erroneously found that the prayer for interest was not pleaded while it was clearly pleaded at paragraphs 18 and 19 of the appellant's defence and counterclaim.

14. On the issue of costs, Mr. Maina's argument was that it ordinarily follows the event. Having found that the appellant was not culpable and considering the long litigation history of the matter, being 3 years in the criminal court and 14 years in the civil court, it was submitted, that the appellant did incur costs of hiring lawyers and spending time in court for which it ought to be compensated. To support this submission, counsel relied on the case of James Koskei Chirchir vs. Chairman Board of Governors Eldoret Polytechnic (2011) eKLR where this Court faulted the trial court for not awarding costs without an explanation in as much as it is its discretion. We were also urged to be persuaded by the case of Mary Ang'awa & 2 Others vs. Nairobi Club & Others (2020) eKLR where the High Court held that costs should be awarded to a successful party.

15. Opposing the appeal, learned counsel Mr. Odera submitted that even as this appeal challenges both matters of law and fact, the record of appeal does not bear the typed proceedings which would assist the Court to determine whether the learned trial Judge erred as per the facts presented to him; and that the appellant was not a party to the undertaking to pay damages.

16. Counsel submitted that the appellant's counterclaim was for general and aggravated damages and loss of interest, which the learned Judge correctly addressed as to their merit at paragraph 164 of his judgement. To this end, the 1st respondent relied on this Court's decisions in Stima Investment Co-operative Society Limited vs. David Waiganjo Kigwe (2020) eKLR and Francis Wainaina vs. Kenya Commercial Finance Company Limited (1995) eKLR where in both cases, the general principle brought out is that a party claiming a particular rate of interest, should lead evidence on the same; it is not upon the courts to impose interest rates on parties.

17. Mr. Odera reiterated that in the absence of typed proceedings, the learned Judge cannot be faulted in arriving at the decision he did; that at paragraph 156 of the impugned judgement, it was held that the claim being unsupported by both pleadings and evidence, cannot succeed; and that in the premises, the appellant's counterclaim was rightly dismissed.

18. On the issue of costs, it was submitted that it is only after 4 years that the 1st respondent amended its pleadings to join the appellant. Further, it is the appellant who applied to be joined as an interested party in the application filed by the 1st respondent seeking injunctive orders against the 2nd respondent from disposing of the funds.

19. In urging us to dismiss the appeal, Mr. Odera asked us to consider that during the pendency of these proceedings, the appellant made an application under the 'slip rule' before Odunga, J. (as he was then), seeking intervention on the issue of costs, which was declined.

20. In a brief rejoinder, Mr. Maina submitted that the issue of interest remains unopposed as the 1st respondent did not address it at the trial. Secondly, on the Mareva injunction sought in the application filed by the 1st respondent, one of the accounts sought to be attached belonged the appellant, yet the appellant was not a party to the suit. Finally, on the lack High Court proceedings in the record, it was contended that they were not necessary as the main issue in this appeal relates to refusal to grant interest and costs to the appellant.

21. Our mandate as a first appellate court is to review, re-assess and re-evaluate afresh the evidence adduced in the trial court and to draw our own conclusion giving due regard to the fact that we neither saw nor heard the witnesses testify. This position was stated in the case of Selle & Another vs. Associated Motorboat Company Ltd. & Others (1968) EA 123. Having considered the record of appeal, the respective submissions made before us and the law, we have isolated the issues for determination to be the effect of the failure to provide the proceedings in the trial court; whether the appellant was entitled to interest on the sum of Kshs. 14,000,000/=; and whether the appellant was entitled to costs.

22. On whether failure to provide the proceedings of the trial court is fatal to this appeal, rule 89 of the Court of Appeal Rules, 2022 is instructive on what constitutes a record of appeal as follows:

    1. For the purposes of an appeal from a decision of a superior court in exercise of its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents

        a. an index of the documents in the record with the numbers of the pages at which they appear;

        b. a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service as required by rule 79, that respondent's last known address and proof of service on him or her of the notice of appeal;

        c. the pleadings;

        d. the trial judge's notes of the hearing;

        e. the transcript of any shorthand notes taken at the trial;

        f. the affidavits read and documents put in evidence at the hearing or, if such documents are not in the English language, certified translations thereof;

        g. the judgment or order;

        h. the certified decree or order;

        i. the order, if any, giving leave to appeal;

        j. the notice of appeal; and

        k. such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:

    Provided that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.

23. A reading of the above provision connotes a mandatory prescription by the use of the word 'shall.' The trial court's proceedings, which are essentially the trial judge's notes of the hearing, must form part of the record of appeal. Although the Rule 89(3) provides that they can be excluded from the record on application by a party, the appellant did not demonstrate to us that was done in this case or the necessity of leaving out the typed proceedings.

24. The appeal before us is mainly based on the argument that the learned Judge failed to award interest on the Kshs. 14,000,000/= released to the appellant and costs. The character of the Court is that it is a court of record. The consequence of absence of a complete record where certain issues are adjudicated upon with finality, cannot be termed to be shallow or idle. In Law Society of Kenya vs. Centre for Human Rights & Democracy & 12 others (2014) eKLR, the Supreme Court held that in the absence of a complete record of appeal, the appellate court cannot be expected to determine the appeal. Such an appeal would be incomplete and incompetent.

25. As per the findings in the renowned case of Mbogo vs. Shah (1968) EA 93, we can only interfere with the exercise of a trial Judge's discretion in circumstances where we find that the Judge misdirected

himself and, as a result, arrived at a wrong decision. The review of the discretion can only be can only be carried out upon examining holistically the record in the trial court. In the absence thereof, we are unable to evaluate the evidence that was tendered in regard to the issue of interest so as to reach a conclusion whether the appellant was entitled to the interest or not. On this basis alone, we are handicapped and unable to find for the appellant on this issue, but for the completeness of record and the issues raised, we shall address ourselves to the other two issues.

26. On whether the appellant was entitled to interest on the withheld amount of Kshs. 14,000,000/=, the starting point is the consent between the appellant and the 1st respondent dated 3rd March 2020 and adopted as an order of the High Court. The terms therein were with respect to the money belonging to the appellant being held by the then Giro Bank Limited (now trading as I & M Bank after acquisition), and the money having been deposited in court via Banker's Cheque No. 29201. It was agreed:

    1. That the said sum of money be released by the court to the appellant's Advocates, M/S Maina Njuguna & Associates.

    2. That upon release, the said money be credited to the following bank account: -

       Maina Njuguna & Associates Co-operative Bank of Kenya Kilimani Branch

       Account No. 0113600319xxxx

27. From the excerpt of the above consent, the issue of payment of interest on the withheld amount was not addressed. In its defence and counterclaim dated 11th June 2002, the appellant pleaded for the loss of interest as follows:

> " And the 4th defendant counter claims for general damages, aggravated damages and loss of interest on deposit from 22nd July 2003."

28. Without having the benefit of the full record of the transcript of the trial court but having perused the summary of the witness statement of John Mathaara Mwangi, the appellant's witness, as summarized by the trial court in its judgement, there is still no indication or even evidence which was led by the appellant on the proposed interest rate it wished to be awarded on the withheld sum.

29. In making his observation on the prayer of the alleged loss of interest, the learned Judge held as follows at paragraphs 162 – 165 of his judgement:

> " 162. ...In its counterclaim, the 4th defendant (now the appellant) only claimed general damages, aggravated damages and loss of interest on the deposit from 22nd July 2003...

163. ...no evidence was led to prove that the plaintiff (now the 1st respondent) action was malicious or was arrogant. The plaintiff seems to have acted on the statement made by the 2nd defendant which implicated the 4th defendant. It therefore acted reasonably though erroneously in the circumstances. As for general damages...there can be no general damages in breach of contract... As for the claim for loss of interest on deposit, apart from a bare claim, no basis was set in the pleading for seeking the same. Apart from that, no evidence was led to support the claim that any interests was due, the applicable rate of such interest and how much it was...

163. Loss of interest in my view, is a species of loss of income and as was held by the Court of Appeal in Mumias Sugar Company Limited vs Francis Wanalo (2007) 2 KLR 74, this type of claim (loss of future

earnings) could be a claim on its own and the figures need not be plucked from the air because the plaintiff would be expected to furnish the material on which a reasonable figure would be based.

> “ 164. Accordingly, that claim being unsupported by both pleadings and evidence cannot succeed. In the premise, the 4th defendant’s counterclaim fails and is dismissed.”

30. Section 26 of the *Civil Procedure Act* is instructive that the award of interest is payable at such rates as the court deems fit. Award of interest is therefore a discretion of the court. We pose and ask on what item is the interest payable in the instant case. According to section 26, it is payable where the subject matter is a decree for money which is the principal sum adjudged. In the scenario before us, it cannot be said that there was a definitive principal sum that was to be adjudged. As we have observed earlier on, the withheld amount of Kshs. 14,000,000/= having been released to the appellant, there was nothing else to be adjudged for the trial court to exercise its discretion in awarding interest. In the premises, it behooved the appellant to lead evidence on the interest it supposes that it was entitled to.

31. We then arrive at the inescapable conclusion that the approach taken by the learned Judge, as he was then, is neither abhorrent nor aberrant in view of the fact that there was no evidence led on the issue of interest. The appellant having failed to prove the rate of interest which it was entitled to, and its claim not being a liquidated one, it was not upto the trial court to make that decision for it. We further reiterate that the learned Judge cannot be faulted for reaching the decision he did without the benefit of perusing the trial court proceedings in their entirety.

32. Finally, on the issue of costs, referring again to section 27 (1) of the *Civil Procedure Act*, the law states:

> Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

33. The two principles derived therefrom, are that award of costs follows the event but at the same time, it is a discretion of the court or judge. Having found that the appellant’s claim was not merited, the learned Judge ordered that there would be no costs awarded to any party.

34. Mr. Odera drew our attention to the fact that the appellant filed an application dated 15th January 2020 under the ‘slip rule’ asking the trial court to award it costs. In a fairly detailed ruling dated 1st March 2021, the learned Judge held as follows on the reasons why he did not award cost to either party at paragraph 3:

> “ In the case before me, the plaintiff lost as against the 4th defendant in respect of its claim and the 4th defendant also lost in respect of its claim against the plaintiff. As both of them lost, it did not make sense to award them costs, which would eventually cancel out.”

35. This Court in Supermarine Handling Services Limited vs. Kenya Revenue Authority (2010) eKLR emphasized that as costs are a discretion of the court, the appellate court should exercise caution in

interfering with such discretion unless it is demonstrated that the discretion was exercised on wrong principles as follows:

> " Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule."

36. In our view, we are unable to find the point of departure from the finding of the trial court on the issue of costs. We hold, as the trial Judge did, that since neither of the claims of the parties before him succeeded, it would not make judicial sense to award costs to one party, to the detriment of the other. We find soundness in that conclusion. This ground of appeal on the failure to award costs, similarly fails.

37. For the above reasons, we find that the appellant's appeal is devoid of merit. We accordingly dismiss it in its entirety with costs of the 1st respondent.

38. Orders accordingly.

conclusions

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.