



Kibic Star Electro Limited & 2 others v Southern Credit Banking Group (Civil Appeal 305 of 2015) [2022] KECA 71 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 71 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 305 OF 2015
DK MUSINGA, SG KAIRU & F SICHALE, JJA
FEBRUARY 4, 2022**

BETWEEN

KIBIC STAR ELECTRO LIMITED 1ST APPELLANT

MR. KANG SUK LEE 2ND APPELLANT

MRS. YOUNG SOOK LEE CHO 3RD APPELLANT

AND

SOUTHERN CREDIT BANKING GROUP RESPONDENT

*(Appeal from the Judgment and Decree of the High Court at Nairobi
(Kimaru, J.) delivered on 28th May 2010 in HCCC NO.252 of 2001)*

JUDGMENT

1. On 22nd February 2001, the respondent filed a suit against the appellants seeking to recover a sum of Kshs.23,141,488.70 plus costs and interest at the rate of 4% per month with effect from 31st January 2001 until payment in full.
2. The suit was premised on a term loan and bills discounting facilities that were granted to the 1st appellant by the respondent. The facilities were guaranteed by the 2nd and 3rd appellants. The said facilities were further secured by a legal charge over L.R 7741/73 Nairobi. That property was owned by the 2nd appellant.
3. The 1st appellant defaulted in repayment of the said facilities. With the 2nd appellant's approval, the charged property was sold for Kshs.30,000,000. The respondent stated that after the sale of the said security the balance due on the facilities as at 31st January 2001 was Kshs.23,141,488.70, whose breakdown was set out in the plaint.
4. The 1st appellant denied that it defaulted in repayment of the facilities. It contended that there was an agreement between itself and the respondent that the charged property would be sold by private



treaty and that the respondent would receive the purchase price in full and final settlement of the loan and the bill discounting facilities; that the sale realized Kshs.30,000,000; and that the appellant was in flagrant breach of the aforesaid agreement by purporting to recover the alleged balance.

5. The 2nd and 3rd appellants denied having executed any guarantee in favour of the respondent as alleged. They argued that if such guarantee was allegedly executed, then it was null and void and not enforceable, having been signed by two signatories instead of three and because there was no consideration offered.
6. During the hearing of the suit before the High Court, only the respondent's representative testified; the appellants did not adduce any evidence.
7. In its judgment, the High Court held that the respondent had established its case and entered judgment in its favour in the sum of Kshs.23,141,488.70 together with interest at the rate of 25% per annum with effect from 31st January 2001 until payment in full.
8. Being dissatisfied with that judgment, the appellants preferred an appeal to this Court on grounds that the learned judge erred in law and fact in failing to appreciate that: the agreement dated 26th July 2000 between the appellants and the respondent constituted the one and only single agreement that governed their rights and obligations; that by the sale of the 2nd appellant's prime property, L.R No. 7741/73 Kitsuru, the entire indebtedness of the appellants to the respondent was fully discharged and settled; that all the letters of offer executed in respect of the bills discounting facilities constituted past consideration; that having sold the 2nd appellant's property towards realization of its security any further claims by the respondent amount to unjust enrichment; and on the whole the learned judge erred in concluding that the respondent had discharged the burden of proving its case on a balance of probability.
9. During the hearing of the appeal, the parties relied on their written submissions which counsel highlighted.
10. Mr. Odera, learned counsel for the appellants, condensed his submissions into three grounds namely: the sale of the 2nd appellant's property amounted to full discharge of the appellants' liability; the respondent's claim amounts to unjust enrichment; and the 2nd and 3rd appellants were not served with demand to pay.
11. On the first issue regarding discharge of liability, counsel submitted that on 22nd February 1999, the respondent offered to reschedule and consolidate the appellants' facilities and the rescheduled amount was Kshs.24,635,104.50; on 26th July 2000 the parties held a meeting and the 2nd appellant agreed to have his property at Kitsuru sold. The proceeds of the sale were to be "paid directly to the Respondent's Bank towards the liabilities of the 1st Appellant."
12. The appellants' counsel further submitted that the 2nd appellant's property having been sold in August 2000 at Kshs.30,000,000, since the rescheduled facilities had been agreed at Kshs.24,635,104.50 about a year earlier, the sale proceeds were sufficient to clear the entire debt.
13. On the second limb, about alleged unjust enrichment, the appellants' counsel submitted that since the respondent benefited from the sale of the 2nd appellant's property in full and final settlement of the debt, it would be unjust to allow the respondent to make further claims. He cited the case of *Chase International Investment Corporation & Another v Laxman Kesbra & Another* [1976-80] 1 KLR.
14. Counsel further submitted that the principal loan having been Kshs.10,000,000, to seek to recover an amount of nearly Kshs.100,000,000 as per the decree is unconscionable and contrary to section 44A of the [Banking Act](#).



15. Lastly, counsel submitted that the 2nd and 3rd appellants, being guarantors, were not served with any demand to pay and therefore no liability attached upon them. He cited *Fina Bank Limited v Anil Mohanlal Chandarana & Another*, Civil Suit No.100 of 2000 and *Kenya Commercial Bank Limited v Kipng'eno Arap Ngeny & Another*, Civil Appeal No. 100 of 2001.

With that, counsel urged us to allow the appeal.

16. The respondent opposed the appeal. Miss Kahiti, learned counsel for the respondent, submitted that the appellants did not tender any evidence before the trial court to controvert the respondent's evidence; that the respondent produced the minutes of the meeting held on 26th July 2000 between the appellants and the respondent where it was agreed that the 2nd appellant's charged property was to be sold at Kshs.30,000,000 and the proceeds were to be paid directly to the respondent by the purchaser towards the liabilities of the 1st appellant.

17. Counsel added that there was no mention in the said minutes confirming that henceforth the rights and obligations of the parties in so far as the bills discounting facilities contract was concerned would be extinguished. To the contrary, the respondent's witness proved that the sale proceeds cleared the 1st appellant's overdraft facility and term loan but not the bill discounting facilities.

18. Miss Kahiti further submitted that from the foregoing, there was no unjust enrichment on the part of the respondent, and in any event, the appellants had not pleaded that issue in their respective defences. Similarly, the issue of service of notice upon the 2nd and 3rd appellants was not raised as a ground of appeal in the memorandum of appeal and therefore the issue cannot be considered by this Court, counsel added. She urged us to dismiss the appeal in its entirety.

19. We have considered the record of appeal and submissions by counsel. We shall first dispose of the last issue that was raised by the appellant's counsel in his submissions, that is, whether the 2nd and 3rd appellants were served with a demand to repay. Rule 104 (a) of this Court's Rules states as follows: -

“ At the hearing of an appeal-

- a. No party shall, without leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 93 or rule 94.”

20. There is no dispute that the issue of service of demand notices upon the 2nd and 3rd appellants is not contained in the memorandum of appeal. No leave was sought to introduce and argue it. We cannot therefore entertain it at all.

21. The gravamen of this appeal is whether the sale proceeds of the 2nd appellant's property known as L.R. No.7741/73 satisfied all the banking facilities that had been advanced to the appellants by the respondent or whether there was any outstanding balance upon receipt of the Kshs.30,000,000 by the respondent.

22. In the plaint, the respondent stated that after the sale of the said property and receipt of the proceeds thereof, there was a balance of Kshs.23,141,488.70 as at 31st January 2001. The respondent gave the breakdown of that balance as follows:

- “(i) Kshs.3,807,804/ on bills drawn by C&A Department Limited.
- (ii) Kshs.14,204,988.70/ on bills drawn by Seoul Garden Restaurant Limited.



- (iii) Kshs.5,060,148/ on bills drawn by Fursys (K) Limited.
- (iv) Kshs.68,548/ on bills drawn by Photo Hollywood Limited.”

The respondent stated that all the above bills were discounted by the 1st appellant.

- 23. The appellants’ main defence was that there was an agreement between the 1st appellant and the respondent that the sale proceeds of Kshs.30,000,000 would be a full and final settlement of the loan and bill discounting facilities. The appellants referred the Court to minutes of a meeting held on 26th July 2000 between the appellants, the respondent and the purchaser of the 2nd appellant’s property that was then charged to the respondent.
- 24. It is important that we refer to the relevant part of those minutes to appreciate their effect. This is what was resolved.

- “ 1. Mr. Tiger lee, on behalf of his wife Mrs. Young Sook Lee agreed to sell his property plot No. L.R 7741/73 Kitisuru Estate, Nairobi to Messrs Holy Spirit Association for Unification of World Christianity for the sum of Kshs.30 million.
- 2. Messrs Holy Spirit Association for Unification of World Christianity agreed to purchase the property for shs.30 million.
- 3. Messrs Holy Spirit Association for Unification of World Christianity will pay a sum of shs.5 million cash and the balance of shs.25 million to be paid over 18 months in quarterly instalments with an interest rate of 15% p.a. It was further agreed that all the monies would be paid directly to Southern Credit Banking Corporation Ltd towards the liabilities of Kibic Star Electro (K) Ltd.
- 4. It was also agreed that Mr. Lee would have the property transferred to Messrs Holy Spirit Association for Unification of World Christianity and Southern Credit Banking Corporation would have a first legal charge over the property and the loan amount of shs.25 million plus interest would be guaranteed by both Mr. & Mrs. Lee.
- 5. The shs.5 million to be deposited with Southern Credit Banking Corporation Ltd immediately.”

- 25. The key words in those minutes for the purposes of this appeal are that: -

“It was further agreed that all the monies would be paid directly to Southern Credit Banking Corporation Ltd towards the liabilities of Kibic Star Electro (K) Ltd.(Emphasis supplied)

- 26. Following that meeting, a sale agreement in respect the said property was drawn on 11th August 2000 by the respondent’s advocates. Statements of account in the record of appeal that were sent by the respondent to the 1st appellant show that on 31st October, 2000 there was a credit transfer of Kshs.30,000,000 into the 1st appellant’s account and the outstanding balance on 30th April 2001 was shown to be Kshs.12,617,086.80.
- 27. The minutes we have quoted above do not show that upon receipt of the Kshs.30,000,000 the appellants would be discharged of all their liabilities to the respondent. The appellants did not adduce any evidence to show that the respondent had waived the balance that was due. To the contrary, the said sum paid was “towards the liabilities of Kibic Star Electro (K) Ltd.” Those words must be given their



ordinary meaning and no more. There is a difference between making a payment “in full settlement of all liabilities” and making a payment “towards the liabilities.” Parties are bound by the terms of their contract. A court cannot read into a contract a different intent and meaning other than what is plainly disclosed by the express terms of the contract. See *National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd & Another*, Civil Appeal No.95 Of 1999.

28. We therefore dismiss grounds 1 and 2 of the appellants’ appeal that alleged that the learned judge erred in failing to find that the sale proceeds of the 2nd appellant’s property was in settlement of all the appellants’ indebtedness to the respondent.
29. Equally, we reject the appellants’ contention that the respondent’s claim for further payment by the appellants amount to unjust enrichment. We say so because there was uncontroverted evidence that there were still outstanding liabilities even after receipt of Kshs.30,000,000 towards the appellants’ liabilities.
30. All in all, we find this appeal bereft of merit and dismiss it in its entirety. The appellants shall bear the costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

