Jackline Awuor Olendo t/a Rajal Enterprises v Equity Bank Limited (Civil Appeal 351 of 2019) [2022] KECA 1279 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KECA 1279 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 351 OF 2019

K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA

NOVEMBER 18, 2022

BETWEEN

JACKLINE AWUOR OLENDO T/A RAJAL ENTERPRISES ..... APPELLANT

AND

EQUITY BANK LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (M. Kasango J.) delivered on 30th May, 2019InHCCC No. 321 Of 2012)

JUDGMENT

1. In or about the month of August 2007, the appellant, Jackline Awuor Olendo T/A Rajal Enterprises, applied for an asset finance loan (the loan) from the respondent, Equity Bank Ltd, in the sum of Kshs 4,300,000 to finance the purchase of a diesel motor lorry (the lorry). The terms of the asset finance loan agreement were that the loan was to be repaid by 36 monthly instalments of Kshs 148,200. The appellant, having complied with the requirements specified in the facility letter of offer, secured the requisite finance and purchased a diesel lorry registration number KXXX XXXX. The loan was secured by a chattels mortgage over the lorry. It is noteworthy that the record of appeal before us does not contain the letter setting out the terms of the asset finance facility in issue.

2. In part performance of her part in the asset finance facility, the appellant made various monthly instalments on account of the loan up and until November 11, 2009 when she made a written request to the respondent to reschedule the loan then outstanding in the sum of Kshs 1,164,970.

3. In her letter dated November 11, 2009, the appellant stated:

> ' Due to lack of business in the transport sector and mechanical problems, we are not in good position of paying one hundred and forty-eight thousand five hundred per month, so we

are requesting the bank to reduce the amount to one hundred thousand per month. Please consider our request.'

4. The respondent acceded to the appellant's request to restructure the then outstanding amount due and payable on account of the loan vide its letter dated December 10, 2009. Accordingly, the amount outstanding on account of the loan in the sum of Kshs 1,164,970 was to be repaid by 12 monthly instalments of Kshs 106,595 with effect from the month of February 2010.

5. The appellant accepted the mutual variation of terms on which the loan was rescheduled and continued to enjoy full control of the lorry until May 4, 2010 when the respondent repossessed it on the grounds that the appellant was in arrears of the agreed monthly instalments. To have the lorry released, the appellant paid a sum of Kshs 19,000 to regularise the loan account; a further sum of Kshs 245,000; and storage charges of Kshs 4,480.

6. On June 29, 2010, the respondent repossessed the lorry once again on allegations that the appellant had fallen into arrears contrary to the agreed terms contained in the letter of December 10, 2009. On or about July 8, 2010, the appellant deposited a cheque of Kshs 300,000 out of which the respondent credited the appellant's loan account with a sum of Kshs 241,637.90 on July 14, 2010.

7. By a letter dated July 19, 2010, the appellant requested for reconciliation of the loan account and release of the motor vehicle. According to her, the respondent ignored her request and subsequent reminders decrying the continued retention of the lorry and loss of business. Except for her letters addressed to the respondent, we find nothing on record to suggest that the appellant took steps to personally call at the respondent's offices to verify the accounts, settle the sums (if any) in arrears, and secure release of the lorry. Instead, she elected to institute civil proceedings culminating in the judgment impugned in the instant appeal.

8. By a plaint dated March 29, 2012, the appellant instituted proceedings in the High Court of Kenya at Nairobi, being HCCC No 321 of 2012 praying for:

' (a) The sum of Kshs 7,560,000/= with interest at commercial rates or at the contractual applicable rate with effect from June 2010 until release of the motor vehicle.

b. The sum of Kshs 81,564/= which was deducted in payment of the initial loan facility after the letter of offer dated December 10, 2009 and hence lay claim for it.

(c) Loss of business growth at 15% per month.

(d) Storage charges accruing from the repossession of the said motor vehicle until release of the same.

(e) Compensation of value of vehicle at time of repossession.

(f) Accrued interest on a) to e) from June 2010 until release of the motor vehicle and payment in full.

(g) Costs of this suit herein.

(h) Interest on a) to e) above at court rates

(i) An order of accounts.

(j) Any such other or further relief as this honourable court may deem fit to grant.'

9. In summary, the appellant's suit against the respondent was founded on the alleged fraud and breach of contract by: failing to honour the terms of the loan; issuing demands for sums not due; wrongfully repossessing the lorry; failing to apply funds held in the appellant's account towards repayment of the rescheduled loan; failing to supply the appellant with the loan repayment schedule; failing to render a true account; and by failing to release the lorry despite full settlement of the loan account.

10. In its statement of defence dated July 6, 2011, the respondent denied the particulars of fraud and breach of contract pleaded in the appellant's plaint and contended: that the appellant fell in arrears of and, from time to time, made payments short of the agreed monthly instalments in consequence of which the respondent repossessed the lorry; and that the appellant sat back and neglected to collect the lorry on release in consequence of which she incurred the loss and storage charges complained of.

11. In her judgment dated May 30, 2019, the learned judge (Mary Kasango, J) dismissed the appellant's claim with orders that each party bears their own costs. According to the learned judge:

> ' 14. the plaintiff's repayment of its restructured account continued to be insufficient until the motor vehicle was repossessed in May 2010. The same applies to the second repossession of the motor vehicle in July 2010. The plaintiff's restructured bank account statement reveals that the plaintiff did not remit amounts sufficient to make payment as per the restructure agreement.
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> 16. In the end, however, I do find in respect to issue (a) that the bank was not wrong to repossess the plaintiff's motor vehicle.
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> 20. None of those letters, by or on behalf of the plaintiff, received a response from the bank. It is also not clear if the plaintiff ever presented itself to the bank officials for the release of the motor vehicle to be undertaken. It was not enough for the plaintiff to write letters asking for the release of the motor vehicle and fail to attend at the bank for such release to be done.'

12. Aggrieved by the judgment the appellant moved to this court on appeal on 8 grounds set out in her memorandum of appeal dated July 29, 2019, namely that the learned judge erred in law and fact: in failing to find that the respondent's repossession of the lorry on June 29, 2010 was unlawful since the appellant's loan was not in arrears; by failing to understand and appreciate the relationship between the appellant's bank accounts number XXXX and their bearing on the case; by failing to find that it was the responsibility of the respondent to do a reconciliation of the appellant's bank accounts; by failing to find that the respondent could not repossess the lorry when the appellant's bank accounts had a credit balance that would offset the alleged outstanding loan instalments; by failing to address the issues raised in the appellant's suit in its entirety; by failing to hold that the respondent had an obligation to ensure that the appellant was informed of the mode of picking the lorry as soon as she cleared the loan balance; by failing to assess general damages for loss of business payable to the appellant; and by failing to award the appellant compensation for the value of the lorry at the time of repossession.

13. This being a first appeal, it is our duty, in addition to considering the written and oral submissions made by learned counsel for the appellant and of the respondent, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this court in *Arthi Highway Developers Limited vs West End Butchery Limited and 6 others [2015] eKLR* citing the case of *Selle v Associated Motor Boat Co [1968] EA p 123.*

14. In Selle's case (ibid), the Court held that:

> ' An appeal to this court from a trial by the High Court (as well as the ELRC) is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions.'

15. Having considered the record of appeal, the rival submissions of learned counsel for the parties, we are of the considered view that the appeal herein turns upon our findings on five main issues, namely: whether, on the two occasions when the lorry was repossessed, the appellant was in arrears of the monthly instalments by which the loan was repayable; whether, in any event, the respondent was entitled to repossess the lorry; whether the respondent acted in breach of contract or was otherwise liable for fraud as alleged; whether the appellant was entitled to the relief sought; and what orders ought we to make in determination of this appeal, including orders as to costs.

16. On the 1st issue, the appellant's case was that at no time did she fall into arrears. She claimed that the respondent acted fraudulently and in breach of contract in failing to render a true account of her loan repayment, and, further, in wrongfully repossessing and failing to release the motor vehicle to her despite persistent written request and subsequent reminders. She prayed for relief as pleaded in her plaint as particularized in paragraph 8 (a) to (j) above.

17. On its part, the respondent contended that soon after grant of the asset finance facility was contracted, the appellant fell into arrears thereby incurring penalties as charged in accordance with the loan agreement on 16 occasions between November 15, 2007 and September 15, 2009. Repossession of the lorry by the respondent on September 15, 2009 prompted the appellant to request the respondent to reschedule the repayment on more favourable terms vide her letter dated November 11, 2009 citing 'lack of business in the transport sector and mechanical problems,' and stating that they were not well placed to repay the loan as previously scheduled.

18. The respondent acceded to the appellant's request vide its letter dated December 10, 2009 and rescheduled the loan on mutually agreeable terms. Despite the restructuring of the monthly instalments, the appellant defaulted leading to repossession of the lorry for a second time on May 6, 2010, and for the third time on July 2, 2010. In addition to the sums outstanding on the due dates and the penalties levied thereon, the respondent contends that repossession on the three occasions attracted repossession fees and storage charges for which the respondent rendered an account as evidenced in the bank statements contained in the record of appeal as put to us.

19. In view of the foregoing, and having carefully examined the record before us, we find nothing to fault the learned judge's findings that the appellant's bank account statement revealed that the appellant did not remit amounts sufficient to meet payments in compliance with the restructure agreement. Accordingly, the learned judge was correct in holding that the respondent was not wrong in repossessing the appellant's motor vehicle., It was entitled to do so in light of the repeated defaults in servicing the loan in accordance with the restructured agreement. That settles the 1st and 2nd issues.

20. On the 3rd issue, we find no evidence to suggest that the respondent acted in breach of contract, or fraudulently, as claimed in the plaint. It is a cardinal rule that fraud must not only be pleaded, but also proved. This court has time and again underscored this age-old legal principle. It is trite law that any allegations of fraud must be pleaded and strictly proved (see *Ndolo v Ndolo [2008] 1 KLR (G&F) 742)*.

21. In *Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR,* this court had this to say:

> ' Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.'

22. The first witness to testify in the appellant's case, George Waida Opondo, the manager of the appellant's enterprise, gave no evidence of the alleged breach of contract or fraud on the part of the respondent. Neither did the second witness, Nelson Mutungi, the manager of Nodu Enterprises.

Those allegations were unsubstantiated and, accordingly, the appellant's appeal fails on that score, and that settles the 3rd issue.

23. As to the 4th issue, the appellant's claim for Kshs 7,560,000 with interest on account of loss of business during the three occasions when the lorry was repossessed cannot stand. The repossession was in consequence of her default in payment of the instalments as and when they fell due. Neither is she entitled to compensation for loss of business growth at 15% per month, or to storage charges on repossession. The same fate befalls her claim for Kshs 81,564 charged in payment of the initial loan facility. Likewise, her claim for compensation to the value of the lorry at the time of repossession and interest accruing thereon is, in our considered view, without any legal basis.

24. Having carefully considered the record of appeal, the grounds on which it is anchored, the impugned judgment and decree of the learned judge, the written and oral submissions of learned counsel for the appellant and for the respondent, we find that the appellant's appeal lacks merit and, accordingly, hereby order and direct that:

a. The appellant's appeal be and is hereby dismissed;

b. The judgment and decree of the High Court of Kenya at Nairobi (Mary Kasango, J) is hereby upheld; and

c. The costs of the appeal shall be borne by the appellant.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

K. M'INOTI

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JUDGE OF APPEAL DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR