



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & OTIENO-ODEK, JJA)

CIVIL APPEAL No. 214 of 2014

BETWEEN

JUBILEE INSURANCE COMPANY LIMITED.....APPELLANT

AND

KISHOR RAMJI HIRANI.....1st RESPONDENT

RAMJI GOVIND HIRANI.....2nd RESPONDENT

MRS R. G. HIRANI.....3rd RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Khaminwa J.) delivered on 14th December 2011

in

NRB. HCC No. 761 of 1999)

JUDGMENT OF THE COURT

1. The 1st and 2nd respondents *Kishor Ramji Hirani* and *Ramji Govind Hirani* are the joint registered proprietors of LR NO. 7785/533 (Original LR No. 7785/ 266/2) hereinafter referred to as the suit property.

2. In 1997, the 1st respondent *Kishor Ramji Hirani*, applied for a loan of Ksh. 6 million from the appellant *Jubilee Insurance Company Limited* for purposes of completion of a residential house then being constructed on the suit property. By letter dated 10th March 1997, the appellant approved the loan of Ksh. 6 million and advised the 1st respondent it would take security of the suit property. Consequently, through instructions given by the appellant, the 1st respondent was advanced the sum of Ksh 4 million by *Diamond Trust Bank* which is an associate company in the appellant group of companies.

3. By letter dated 3rd April 1997, *Diamond Trust Bank* on instructions of the appellant approved a loan of Ksh. 4 million to the respondents. It was agreed the balance of Ksh. 2 million would be advanced to the respondents upon completion of the house.

4. On 5th October 1997, the 2nd and 3rd respondents executed charge documents at the appellants' offices to secure the sum of Ksh. 6 million. On execution of the documents, it was the respondents' expectation that the balance of Ksh. 2 million would be released to them. In their Complaint, the respondents aver the appellant is in breach of the agreement/contract signed *inter alia* in the following manner:

(i) Refusing to furnish a copy of the duly registered charge.

(ii) Failing to register the charge within the stipulated time period or within a reasonable time so as to advance the balance of the sum of Ksh. 2 million.

(iii) Failing, neglecting or refusing to release the sum of Ksh. 2 million.

(iv) In failing to release the said sum of Ksh. 2 million, the respondents suffered loss in that they failed to discharge their liability to Equatorial Finance Company Limited to the tune of Ksh. 650,000/= thereby incurring interest and penalty.

5. Despite breach of contract, the respondents contend the appellant by a notification of sale dated 3rd May 1999 instructed the firm of Forefront Auctioneers to demand the sum of Ksh. 8,193,444/25. On their part, the respondents admitted owing the appellant the sum of Ksh. 5.8 million in repayment of the loan to Diamond Trust Bank Limited in return for Discharge of Charge over the suit property. The respondents denied knowledge of how the appellant arrived at the sum of Ksh. 8,193,444/25 that was being demanded; they also denied having knowledge the appellant had paid any monies to Equatorial Finance Company Limited to clear the respondents' liability and indebtedness.

6. As a consequence of the alleged breach of agreement, the respondents in their Complaint prayed for the following orders:

(a) A declaration that the appellant is not entitled to enforce any of the terms of the charge instrument.

(b) An order to Discharge the Charge and release of the suit property to the respondents.

(c) A detailed statement of account showing what the respondents owe the appellant.

(d) General damages for breach of contract.

7. The appellant filed its statement of defence denying breach of contract and liability for general damages. The appellant averred that in order to secure a first charge over the suit property, it paid Diamond Trust Bank Limited the sum of Ksh. 6,216,478.20 being the principal sum advanced to the respondents together with interest as at 1st September 1998 in accordance with the agreement made on 3rd April 1997. The appellant further averred it was constrained to settle a sum of Ksh. 1,197,496.45 owed by the respondents to Equatorial Commercial Bank in order to secure a discharge over the suit property and enable it secure its interest by registering a first charge over the property. The appellant further contended the respondents failed, refused or neglected to service the loan and fulfill their obligations under the agreements signed between the parties.

8. The appellant admitted in its defence the respondents offered the sum of Ksh. 5.8 million in full settlement in return for Discharge of Charge over the suit property but it declined the offer for reason that a sum in excess of Ksh. 8 million was outstanding in the account. The appellant admitted instructing Forefront Auctioneers to issue notification for sale of the suit property.

9. The trial court (Khaminwa, J.) heard the parties on various dates beginning 24th September 2008 until 17th March 2009. The Judgment, however, was delayed for over 34 months and was finally delivered on 14th December 2011 subsequent to a complaint made to the Chief Justice by the appellant.

The judgment was delivered without notice to either of the parties.

10. The trial court in its judgment issued the following orders:

(i) The charge in respect of LR NO. 7785/533 (Original LR No. 7785/ 266/2) be and is hereby discharged and released from security in favour of the appellant.

(ii) The appellant to release the title documents in respect of LR NO. 7785/533 (Original LR No. 7785/ 266/2) and a valid discharge of charge of the same to the respondents.

(iii) There be a perpetual injunction against the appellant or its agents or servants or assignees or any of them whatsoever restraining them from selling, transferring or disposing of LR NO. 7785/533 (Original LR No. 7785/ 266/2).

(iv) The appellants to pay the costs of the suit to be taxed by the Taxing Officer.

11. Aggrieved by the judgment, the appellant has lodged the instant appeal citing the following compressed grounds in its memorandum of appeal:-

(a) The judgment is a nullity as it was delivered on 14th December 2011 without notice to the parties and was a reaction to a complaint lodged with the Chief Justice against inordinate delay in delivery of the judgment.

(b) The judge erred in law and fact in arriving at her decision.

(c) The judge failed in her evaluation of the evidence on record and erroneously failed to give reasons for rejecting the appellant's case.

(d) The judge failed to make a finding with regard to Ksh. 5.8 million being monies lodged and deposited by the respondents and held by the appellant.

12. At the hearing of this appeal, learned counsel **Mr. Shiraz Magan** appeared for the appellant while learned counsel **Mr. Osiemo** appeared for the respondents. Both parties filed written submissions and list of authorities in the matter. In their submissions, both parties conceded the

impugned judgment dated 14th December 2011 was delayed for over 34 months and was delivered without notice to the parties.

13. On the merits of the case, counsel for the appellant submitted the trial judge failed to properly and comprehensively evaluate the evidence on record; the judge erred in holding the appellant cannot enforce the charge instrument; the court erred in ordering discharge of charge over the suit property; the judge based her decision on findings that the appellant failed to prove certain facts when the appellant had proved its case; and the judge erred in her appreciation and construction of the agreements and contract between the parties.

14. For the appellant, it was submitted the agreement between the parties includes a loan application, a loan agreement, a bridging loan agreement and a corporate guarantee as well as various pertinent correspondence; the trial court did not appreciate the nexus and relevance of all these agreements in determining the intention of the parties; the judge erred in holding the appellant had delayed in registering the charge instrument; the record clearly shows registration of the charge was subject to title to the suit property being clear and the appellant was to get a First Legal Charge over the property. Counsel submitted the existing charge in favour of Equatorial Commercial Bank had to be discharged before a First Charge in favour of the appellant could be registered over the suit property; the trial court erred and failed to appreciate this fact when the court held the appellant had delayed in registering the charge.

15. The appellant further submitted the trial court erred in ordering discharge of charge over the suit property when the loan given to the respondents has not been repaid; it is not in dispute the sum of Ksh. 4 million was advanced to the appellants and the sum attracts interest; the judge also ignored that the appellant had paid to Equatorial Commercial Bank the sum of Ksh. 1,197,496.45 towards the respondents' indebtedness and liability and this sum is to be recovered from the respondents. The judge erred in discharging the suit property and leaving the appellant without security when the sums advanced have not been repaid in full. Based on this submission, the appellant urged us to find the judge erred in her appreciation and evaluation of the evidence on record.

16. The respondents in opposing the appeal submitted they were not aware why the appellant lodged the instant appeal yet the appellant has in its possession deposit of Ksh. 5.8 million and which sum has been accruing interest since 1999 and now stands at approximately Ksh. 14 million. Counsel submitted the crux of the dispute between the parties is the attempt by the appellant to breach the contract and its failure to disburse Ksh. 2 million that was to be used to discharge liability owed to Equatorial Commercial Bank thereby exposing the respondents to interest and penalty.

17. Whereas counsel conceded the impugned judgment was delivered after a three year delay, it was urged it is the respondents who were prejudiced by the delay as the appellant has been trading with the Ksh. 5.8 million it holds as deposit. On the bridging loan agreement with **Diamond Trust Bank**, the respondents aver they were never party to the agreement and have never been informed the terms and conditions thereof and consequently, they are not bound by the interest rate thereon. On the dispute that the appellant could not advance the balance of Ksh. 2 million because the same had been used to offset the respondents' liability to **Equatorial Commercial Bank**, it was submitted the respondents were kept in the dark as regards their loan account and no one communicated to them the appellant had serviced the loan with **Equatorial Commercial Bank**.

18. The respondents submitted the appellant declined the offer of Ksh. 5.8 million in full and final settlement because it is keen to charge unconscionable interest on the sum of Ksh. 4 million that was advanced. The case of **Pius Kimaiyo Langat vs. Cooperative Bank of Kenya Limited [2017] eKLR** was cited to support the submission that unwritten terms of lending which allow the lending institution to run amok in its interest charges bear the hallmark of an unconscionable transaction. Relying on this authority, counsel submitted the trial judge did not err in holding the appellant was not entitled to enforce the charge instrument because the agreement was harsh and unconscionable. The case of **Kenya Commercial Finance Company Ltd. vs. Kipnge'no arap Ngenyi & Another [2002] eKLR** also cited to support submission a court can set aside a contract found to be harsh, oppressive and unconscionable. The respondents concluded their submissions by urging us to find the trial judge did not err in arriving at her decision.

19. We have considered the oral and written submissions by counsel and authorities cited. This is a first appeal and it is our duty to re-evaluate and re-examine the evidence adduced and make our own independent determination. (See **Selle vs. Associated Motor Boat Company [1968] EA 123**; **Williamson Diamonds Ltd vs. Brown [1970] EA 1** and **Arrow Car Ltd vs. Bimomo and 2 Others [2004] 2 KLR 101**).

20. One of the issues urged in this appeal is delay in delivery of the impugned judgment. Both parties concede the judgment was delayed for about three years and delivered without notice to the parties. Pronouncement of judgment is a part of the justice dispensation system and Judgments should be pronounced without undue delay. An unreasonable delay between hearing of arguments and delivery of judgment, unless explained by exceptional or extraordinary circumstances, is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice; however, what is more important is that litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay between hearing of arguments and delivery of judgment.

21. Comparatively, in the Indian cases of **Surender Nath Sarkar vs. Emperor AIR 1942 Cal 225**; **Jagarnath Singh and Others vs. Francis Kharia and others, AIR 1948 Pat 414**; **Sohagiya vs. Ram Briksh Mahto 1961 BLJR 282**, the court held that judgments delivered after inordinate delay are bad in law and such judgments are liable to be set aside. In **Bhagwan Das Fateh Chand Daswani vs. H. P. A. International and Ors. : 2000 (2) SCC 13**, it was observed that :

"A long delay in delivering the judgment gives rise to unnecessary speculation in the minds of parties to case".

22. In **Elizabeth Braganza vs. Tysons Habenga Limited, Civil Appeal No. 285 of 1997**, Tunoi, JA(as he then was) in setting aside a judgment that was delayed for nearly 15 months expressed himself thus:

"Delay in delivering judgment may arise due to a variety of reasons but it is solely the responsibility of the judge who heard the case. What constitutes delay, however, depends on the particular circumstances of each case. ...In this case, the delay was

too inordinate and should not have occurred unless there were compelling reasons which the learned judge should have explained in the judgment. No doubt, by the time she wrote the judgment, human as she is, the learned judge lacked the feel of the case. Also the length of time between hearing the case and writing of judgment give rise to suspicion that a miscarriage of justice occurred through submissions being forgotten or lost.”

23. In contrast, in Johnson M. Mburugu vs. Fidelity Shield Insurance Company Limited [2006] eKLR this Court expressed itself as follows:

“...It is possible that the delay in delivering judgment which was from 15th March 2002,.....to 28th February 2003 when the judgment was delivered is eleven and half (11 ½) months and this could have interfered with the learned judges grasp of the entire case that was before him. However, we are of the view that in general, his judgment appears to have put into consideration all the salient aspects of the case.....However, there is no provision as to the consequence of failure by the court to deliver judgment within the stipulated time.”

24. In Nyagwoka Ogora alias Kennedy Kemoni Bwogora vs. Francis Osoro Maiko, Civil Appeal NO. 271 of 2000), this Court in considering the effect of non-compliance with *Order XXX Rule 1* where it is stipulated judgment should be delivered within 42 days expressed as follows:

“The real question is what the consequence of non-compliance is. No doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void ipso facto. The rule cannot, and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, non-compliance with the rule and particularly persistent non-compliance or inordinate delay.....should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal.”

25. Comparatively, in the UK “The Times” Newspaper of 14th February 1998, it was reported Justice Harman delayed delivery of judgment for some 20th months in a case filed by a farmer bankrupted by a confidence trickster. The farmer’s counsel became so frustrated by the delay that he considered taking out a life insurance on the judge in case he died before delivering the judgment. Whilst ordering a retrial on 13th February 1998 due to delayed judgment on the part of Justice Harman, Lord Gibson Brook LJ is quoted as expressing:

“*Conduct like this weakens the public confidence in the whole judicial process. Left unchecked, it would be ultimately subversive of the rule of law. Delays on this scale will not be tolerated. A situation like this must never occur again.*”

26. Justice Harman resigned and the Lord Chancellor accepted his resignation.

27. In this matter, with great respect, and based on our evaluation of the evidence and judgment rendered by the judge, we are persuaded that the delay was unreasonable and the affected the learned Judge’s appreciation of the matter before her. Save to state that we are persuaded that the judge did not properly evaluate the evidence on record, we refrain, in view of the order that we make, from expressing any concluded views on the merits or otherwise of the issues that required determination by the trial judge lest we prejudice the trial court that will ultimately determine those issues.

28. On the merits of the appeal, the appellant’s contestation is to the effect the judge erred in evaluation of the evidence on record. From the record, it is uncontroverted the sum of Ksh. 4 million was loaned to the respondents and the said sum attracts interest; the respondents received the benefit of the Ksh. 4 million. It is also not disputed the appellant paid the sum of Ksh. Ksh. 1,197,496.45 to Equatorial Commercial Bank towards discharge of the respondents’ liability. Once again, the respondents received the benefit of Ksh. 1,197,496.45.

29. The respondents contend they were not aware of any communication between the appellant and Equatorial Bank on how the Ksh. 1,197,496.45 was paid and the interest thereon. It is contended there was delay in repayment to Equatorial Bank leading to delayed interest and penalty. The respondents further submitted they were not parties to the agreement between the appellant and Diamond Trust Bank on the terms and conditions pertaining to the loan of Ksh. 4 million and consequently, they are not bound to pay any interest rate agreed thereon.

30. We have considered both the appellant’s and respondents submission on the contested issues. Whereas the trial judge appreciated the sums of Ksh. 4 million and Ksh. 1,197,496.45 were either advanced or disbursed for the benefit of the respondents, the judge made a fundamental error in failing to appreciate the appellant had a charge over the suit property as security for the loan advanced and sum disbursed to Equatorial Commercial Bank. In making the order to discharge the charge over the suit property, the trial court erred in failing to consider the sum of Ksh. 4 million and Ksh. 1,197,496.45 had not been fully repaid to the appellant by the respondents.

31. Both the appellant and respondent concede the trial court did not determine the fate of the sum of Ksh. 5.8 million held by the appellant as deposit; the court did not determine the interest rate on the said sum and who is entitled to the money. As between the appellant and respondent, the rate of interest and who is entitled to the sum of Ksh. 5.8 million is a triable issue. We are satisfied the learned judge erred in not making a determination on this issue.

32. Our re-evaluation of the evidence also reveals there is a triable issue as to who owes who what amount. The appellant contends it is owed the sum of Ksh. 4 million plus interest thereon being the sum advanced to the respondents by Diamond Trust Bank; the appellant further contends it is owed the sum of Ksh. 1,197,496/45 and interest thereon being the amount paid to Equatorial Commercial Bank. Conversely, the respondent denies owing the appellant interest on the said monies alleging they were not party to the agreements with Diamond Trust Bank and they were not aware of the payment of monies to Equatorial Commercial Bank. In our considered view, the trial court did not

consider and evaluate the dispute as to who owes who what amount of money and the rate of interest, if any.

33. For the various reasons stated above, we are persuaded the trial judge did not properly evaluate the evidence on record.

34. Consequently, this appeal has merit and is hereby allowed. We set aside in entirety the judgment of the High Court dated 14th December 2011. We remit HCCC No. 761 of 1999 for retrial by any judge of the High Court.

Having remitted the suit for retrial, we refrain from making further comments on the merits of the case. However, as regards the sum of Ksh. 5.8 million held by the appellant as deposit, we order the said sum to continue being held by the appellant on the same terms and conditions upon which it was deposited. The sum to be held as deposit until further orders by the High Court at rehearing of the suit.

35. Each party is to bear its/his/her costs in this appeal. It is so ordered.

Dated and delivered at Nairobi this 22nd day of February, 2019

P.N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR