IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, GATEMBU & M'INOTI, JJ.A)

CIVIL APPEAL NO. 341 OF 2014

BETWEEN

NIC BANK LIMITED.....APPELLANT

AND

VICTOR OCHIENG OLOO.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Mutava, J.), dated 12th June, 2012

in

H.C. Civil Suit No. 3 of 2012)

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JUDGMENT OF THE COURT

This is an appeal by **NIC Bank Limited** (the appellant) from the Judgment and Decree of the High Court (Mutava, J.), delivered on the 12th June, 2012, in which the learned judge dismissed the appellant's suit against **Victor Ochieng Oloo** (the respondent). Aggrieved by the judgment, the appellant lodged a notice of appeal on the 5th July, 2012 and followed it up by filing the appeal now before Court, on the 28th November, 2014.

Briefly the background of this appeal is that on the 15th December, 2009 the appellant filed a suit in the High Court against the respondent claiming *inter-alia* Kshs.5,499,340/=. The said amount was as a result of a loan facility that the appellant had extended to an entity known as Economic Intelligence Ltd (the company) in the amount of Kshs.1,700,000/=. According to the appellant the company defaulted in payment of the amount and as at June, 2005 the company was indebted to the appellant for the sum of Kshs.2,431,604.42/=. The continued default of the company despite several demands from the appellant led to the filing of a winding-up cause against the company. The appellant and the company consented to the winding-up cause which was allowed.

Thereafter the respondent, who was both a director and a shareholder of the company, engaged the appellant with a view of settling the amount that the company owed the appellant. It would appear that the appellant and the respondent held discussions with regard to the settlement of the amount owed, which discussions culminated in the respondent writing a letter dated the 8th April, 2008 to the appellant. In the letter the appellant indicated his willingness to take up the debt in his personal capacity. The respondent proposed that the debt owed and the accrued charges be verified and thereafter the amount owed be transferred to a new loan account created in his name. Under the letter, the respondent also proposed that the amount should not accrue any interest.

The letter did not elicit any written response from the appellant and on the 26th May, 2008 the respondent wrote another letter to the appellant reaffirming his interest in settling the loan. Further, the respondent requested that in the spirit of previous discussions the amount due and payable should be the balance inclusive of interest as at the date when the loan was called up. According to the respondent that amount would be Kshs.1,996,683/=. The respondent further requested the appellant to waive all the charges levied on the account after the 30th June, 2005 when the loan was called up.

The appellant responded vide its letter dated the 8th July, 2008 and indicated that it had acceded to the payment proposal by the respondent. However, the appellant stated that it would not be waiving the accrued interest and charges as had been proposed by the respondent. The respondent did not respond to that letter from the appellant which culminated in the appellant lodging the suit in the High Court against the respondent. According to the appellant the respondent had refused to pay as agreed, despite making an undertaking to pay the loan.

The respondent filed his statement of defence on the 22nd April, 2010 and denied that the letters written to the appellant created any legally binding relationship which could give rise to a cause of action. The respondent further stated that the letters he wrote to the appellant were offers made subject to specific conditions, which offer the appellant declined to accept but instead gave a proposal which in turn he rejected.

The matter proceeded for hearing and the learned judge after hearing the parties rendered his judgment on the 12th June, 2012. In his judgment, the learned judge held that the letters from the respondent dated the 8th April, 2008 and the 26th May, 2008 constituted conditional offers from the respondent to settle the amount owing from the company. However, on whether this offer was accepted by the appellant, the learned judge held that from the letter dated the 8th July, 2008, the acceptance by the appellant was partial and did not substantially correspond to the offer made by the respondent because the appellant declined the request to waive interest and charges. According to the learned judge the letter dated the 8th July, 2008 was a rejection of the offer. On those grounds the learned judge dismissed the suit for lack of evidence and that the appellant had not proved the case against the respondent to the satisfaction of the Court. Aggrieved by the decision of the High Court, the appellant filed its appeal now before us.

The appellant's memorandum of appeal listed seven grounds of appeal as follows: -

> ***(i) The learned judge erred in law and in fact in failing to find that there was a contract between the appellant and the respondent.***
>
> ***(ii) The learned judge erred in law and in fact when he failed to find that there was an admission of liability by the respondent and on which he was bound.***
>
> ***(iii) The learned judge erred in law and in fact when he failed to find that a sum of Kshs.5,499,340/= was advanced to the defendant's company and that the defendant despite his unequivocal proposal to pay the said debt failed, refused and neglected to pay the said amount.***
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> ***(iv) The learned judge erred in law and in fact by relying on undue technicalities in determining the appellant's suit.***
>
> ***(v) The learned judge erred in law and in fact by dismissing the appellant's suit yet the evidence before him proved otherwise.***
>
> ***(vi) The learned judge erred in fact and in law by dismissing the appellant's suit.***
>
> ***(vii) The learned judge erred in coming to the conclusion he did and in giving judgment to the respondent contrary to the weight of evidence tendered in court.***

The parties filed written submissions which were highlighted before us by counsel for the parties.

On ground one, the appellant submitted that the respondent's offer from the two letters was unequivocal and that the request for waiver of interest was a mere request and not a condition precedent to the acceptance of the loan. According to the appellant, the only condition in the respondent's letter was that the offer was subject to verification of the loan, the loan being put in a new account in the name of the respondent and the same being payable in 36 months.

On ground two the appellant submitted that the respondent expressly admitted the debt and undertook to pay the same in his personal capacity. The appellant therefore argued that the learned judge erred when he failed to find there such an admission of liability. On ground three the appellant contended that the respondent did not fulfill his obligations in performance of the contract as per his offer. The appellant argued that its refusal to waive the interest had no bearing on the initial terms of the contract and that the failure to fulfill the terms amounted to a violation of the terms of the contract.

On ground 4 the appellant while relying on the Supreme Court case of ***National Bank Limited vs Anaj Warehousing Limited (2015) eKLR*** submitted that the learned judge erred in relying on old common law rules in finding that the acceptance of the offer was a counter-offer. On grounds five and six, the appellant argued that the learned judge erred when he dismissed the suit and went contrary to the evidence tendered before him. On ground seven the appellant contended that the respondent having made an offer to it that it subsequently accepted, ought to have been stopped from denying the existence of a valid contract in the face of compelling evidence showing the contract existed.

On his part, the respondent submitted that for a contract to be valid it must have the essentials to wit offer, acceptance and consideration. He contended that there was correspondence between the parties from which the appellant alleged a contract was entered between the parties. The respondent argued that his letter dated the 8th April, 2008 contained four key elements; an indication of willingness to take up the debt of the company, a demand for verification of the debt and charges, payment over a period of 36 months and that the amount should not accrue interest.

According to the respondent this letter did not elicit any response from the appellant and he therefore wrote the second letter to the appellant whose key points were the willingness of the respondent to pay the debt owed by the company and a request for waiver of all charges. The respondent contended that the appellant only respondent to the second letter without any reference to the former letter and in their response refused to waive the interest and charges but was agreeable to payment within six months. The appellant argued that the rule is that acceptance must be unqualified and that an offer accepted by response which varies one of its terms is not an acceptance but a counter-offer. The respondent therefore argued that these were material differences because he was unwilling to make payment if there is no waiver of interest and charges and the appellant was unwilling to forego interest and charges, hence no binding agreement can be deemed to have arisen therefrom.

The respondent further submitted that there was no consideration. He submitted that he only made the offer because of the good and long

relationship with the appellant and such a sentimental motive cannot amount to sufficient consideration. In response to ground 2 of the grounds of appeal, the respondent argued that whereas he admitted that the company was indebted to the appellant, he never admitted that he was personally liable for the debt.

We have duly considered the record, the written and oral submissions by learned counsel and the authorities cited. We believe the only issue for determination is whether the correspondence between the parties gave rise to a valid contract and if it did, whether the respondent's failure to pay the loan was in breach of the said contract.

The Court's mandate on a first appeal is set out in **Rule 29(1)** of the Court's Rules namely to re-appraise the evidence and to draw inferences of fact. The Court should remain guided by the principles enunciated in ***Selle vs Associated Motor Boat Company Ltd*** ***[1968] EA 123*** and ***Pil Kenya Ltd vs Oppong*** ***[2009] KLR 442***; that it will not interfere with the conclusions by the trial court unless it is satisfied that the judge misdirected himself/herself in some matters and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong and occasioned injustice by such wrong consideration or omission to consider pertinent and important matters in the case or that the trial judge overlooked a crucial piece of evidence, critical to the outcome of the dispute.

The dispute between the parties herein revolves around the question whether a contract was created between them by virtue of the letters dated the 8th April, 2008, the 26th May, 2008 and the 8th July, 2008. In ***Charles Mwirigi Miriti -vs- Thananga Tea Growers Sacco Ltd & Another [2014] eKLR*** this Court observed,

> ***"It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration."***

There is no dispute that the respondent needed a verification of the debt before payment since there were serious discrepancies on the exact amount due and owing. Again and more importantly, the appellant needed to waive the interest for the respondent to take up payment. No doubt, the appellant rejected the request for verification and waiver of interest, thus no acceptance of the offer put forward by the respondent.

This Court in the case of ***Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited*** ***[2017] eKLR*** stated as follows:-

> ***"It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration."***

We are in agreement with the above excerpt and in our understating the letters dated the 8th April, 2008, the 26th May, 2008 and the 8th July, 2008 could not create a binding and enforceable contract unless both sides accepted the offer in the said letters. The contents of the said letters can only be binding, enforceable and recognized under the law if the offer was accepted as made followed by consideration. In the letter dated the 8th April, 2008, the respondent gave conditional offer, which could be enforceable if the appellant acceded/accepted the demand for verification of the debt and charges, payment for a period of 36 months and that the amount should not accrue interest at all. The said conditions were not accepted by the appellant, therefore no legal obligation or responsibility could result from the said letter, save in so far as clearly accepted by the respondent. It is therefore our view that the sum of Kshs.5,499,340/= as prayed in the plaint before the High Court and before us is not payable in accordance with the letters dated the 8th April, 2008 and the 26th May, 2008.

However, what is payable is the sum of Kshs. 1,996,683/= as accepted and admitted by the respondent in his letter dated the 26th May, 2008. The respondent in the said letter confirmed the amount as due and payable and that he was willing to take up the said amount in his personal capacity. In the premises and in view of what we have said hereinabove we allow the appeal to that extent. We enter judgment for the appellant against the respondent for the sum of Kshs.1,996,683/= with no interest. Each party shall bear its own costs.

Dated and delivered at Nairobi this 26th day of October, 2018.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR