



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, KARANJA & KANTAI, J.J.A

CIVIL APPEAL NO. 257 OF 2008

BETWEEN

BENSON W. K. MUNGAI.....APPELLANT

AND

THE CO-OPERATIVE MERCHANT BANK OF KENYA LIMITED.....RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Emukule, J.) delivered on 19th May 2005

in

H.C.C.C. NO. 781 OF 2001)

JUDGMENT OF THE COURT

By a charge agreement dated 9th April 1996, **Benson W. K. Muigai (the appellant)** charged his property **L. R No. 4953/96 Thika Town** (suit property) to **Co-Operative Merchant Bank Limited (the respondent)**. The property was supposed to be security for a loan facility to the tune of Ksh. 4,000,000/=.

According to the charge document, the appellant was supposed to pay monthly instalments of Ksh. 117,406/=, which was inclusive of the principal amount and the interest for a period not exceeding sixty (60) months, the first instalment falling due on the thirtieth day after the date of draw down and a like amount be paid every subsequent calendar month until entire amount was paid off.

Unfortunately, the appellant fell back in the repayments, and on 25th July 1997, respondent sold the said property by way of public auction to one Moses Kamatu for Ksh 4,500,000/=. According to the respondent, the amount realised from the sale was utilised to offset the unpaid loan but it left a balance, which together with the interest at the rate of 25% per annum amounted to Ksh 8,616,786.45/= as at the time the respondent filed its plaint before the High Court on 29th May, 2001. The respondent claimed that amount together with interest at the rate of 25% p.a from 19th May, 2001 till payment in full.

The appellant filed his statement of defence on 10th September 2001 and denied having obtained a loan facility from the respondent on the terms stated in the plaint. The appellant further stated that if any loan

was advanced to him, then the same had been repaid in full and so he owed the respondent nothing. He averred that the respondent was not entitled to any interest and penalties as it was guilty of laches. He averred that the claim was unreasonable, punitive, extortionist and not maintainable in law and urged the court to dismiss it with costs.

Apparently, the matter had not been fixed for hearing three years down the line, and the respondent, filed on 2nd March 2004 the chamber summons application under the then **Order V1 Rule 13(1) (a) (c) (d) of the Civil Procedure Rules** and **Section 3 and 3A of the Civil Procedure Act**, seeking the striking out of the appellant's defence with costs. It also sought that judgment be entered as prayed in the plaint.

In his affidavit in support of that application, sworn on 16th February, 2004, Kennedy Kaunda Abuga, a legal officer employed by the respondent, deposed that indeed the appellant took the loan, he was unable to service it and the property was sold on 25th July, 1997. He annexed the memorandum of sale to the said affidavit, along with a demand letter to the appellant for Ksh 6,271,561.20 dated 23rd May, 2000.

It is important to note at this juncture however, that there was no copy of a demand letter prior to the sale that was annexed to the affidavit. There is also no copy of the notice of sale warning the appellant that if he did not pay up the balance, then the respondent would be exercising its power of sale.

In his replying affidavit sworn on 8th March 2004, the appellant admitted having taken the loan. He also admitted that he had fallen into arrears and his property was sold. He deposed, however, that the respondent did not communicate to him at all to inform him of the outstanding amount and demand payment. He deposed that he was not served with the statements of the loan account until he requested for them, through his lawyer when the matter was in court. He deposed that the respondent after selling the property, stayed for almost four years while accumulating interest and penalties, without moving to court to file his claim. For that reason, deposed the appellant, the respondent was guilty of laches and was not entitled to the interest and penalties he was claiming.

The court (Emukule, J) heard the chamber summons and allowed it. According to the learned Judge, the defence constituted no viable defence to the respondent's claim, and that it raised no triable issues. The learned Judge did however, acknowledge that the respondent had not proffered any evidence to the court by way of annexures to the effect that the appellant was ever informed of the arrears of any outstanding balance after the sale of his property.

The learned Judge however appears to have trivialised that issue as a "*serious but not fatal oversight*". Ultimately, the learned Judge by his ruling rendered on 19th May 2005, struck out the defence and entered judgment as prayed in favour of the respondent. That ruling is the subject of this appeal, which is predicated on seven grounds of appeal.

The gist of the appellant's complaints is that the plaintiff's claim was not made with specificity; that the amount due was not ascertainable from the material before the court; that his defence did raise triable issues; that the proceeds of the sale of the property were not accounted for, and that the claim was not therefore proved.

He urged this Court to allow this appeal, set aside the impugned ruling and substitute the order allowing the application dated 16th February, 2005 with one dismissing it. He also prays for costs of this appeal.

On its part, the respondent filed notice of grounds for affirming the decision of the High Court on 16th February, 2009. He prays that the Court affirms the impugned judgment on the grounds that the appellant admitted having taken the loan; he fell into arrears; the property was sold; and finally that he never challenged the respondent's exercise of its power of sale.

In support of his appeal, the appellant, through the firm of Malonza & Co. Advocates filed his submissions on 10th August 2015 while the defendant filed its submissions through the firm of Sichangi

& Partners Advocates on 22nd September, 2015. These submissions were buttressing their positions as summarised in their pleadings and affidavits which we have referred to earlier.

At the hearing of the appeal, learned counsel Mr. Orege and Mr. Duncan Akhulia appeared for the appellant and the respondent respectively. They reiterated the contents of their submissions by way of highlighting the same. We have considered the entire record before us as we are mandated to do by **Rule 29 (1) (a) of the Rules of this Court** as a first appellate Court. See also **Kenya Ports Authority vs Kuston (Kenya) Ltd Civil Appeal No. 315 of 2005** where this Court pronounced itself as follows:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

We shall now re-evaluate and reconsider the record before us including the said submissions, and form our own conclusion as to whether the learned Judge was right in striking out the appellant’s defence. The law on striking out of pleadings is now well settled, and there are legion legal authorities in this area. That is why we are rather surprised that learned counsel for the appellant did not cite to us even a single decided case on this subject.

That said however, we have considered the law applicable in these matters, along with the legal authorities cited to us by learned counsel for the respondent. This Court in its decision in **D. T. Dobie and Company (Kenya) Limited – vs – Joseph Mbaria Muchina & Another, Civil Appeal No. 37 of 1978** (unreported) citing with approval the words of **Salmon L. J. in Nagle – vs- Fielden [1966]2 Q.B.D. 633 at pg 646** stated:-

“It is well settled that statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly, it is necessary to consider whether or not the plaintiff has an arguable case.”

This Court has subsequently in many decisions amplified this position and maintained that nobody should be driven from the seat of justice without being accorded an opportunity to be heard unless his/her case is so hopeless that it cannot be resuscitated even by way of amendment. If therefore, a party can show that its defence is not frivolous, or an abuse of the court process, then they deserve to have their day in court. Before a court strikes out a defence summarily, it must satisfy itself that it raises no triable issues whatsoever, and that giving the party a full hearing would be an exercise in futility, and an uneconomic use of Court’s time.

In this case, as we have observed earlier, even the learned Judge acknowledged in his Ruling that there was no evidence that the appellant herein was ever informed of the arrears of the loan either before or after his property was sold. The figures of the outstanding loan were also varied and there was no explanation as to how they had been arrived at. Statements of accounts were availed to the appellant only after requesting for them when the matter was already in court. He was not even given an opportunity to challenge them. These and other issues were in our view deserving of the Judges ear and consideration.

We hold that the appellant was unfairly denied a hearing in a matter that left him straddled with a debt more than double what he had borrowed. He should have been given an opportunity to be heard. We think we have said enough. We find this appeal meritorious. We allow it and set aside the Ruling dated 19th May 2005 allowing the application dated 16th February, 2004, and substitute thereof an order dismissing the same.

We order that **Milimani Commercial Court Civil Suit No. 781 of 2001** proceeds to full hearing before any Judge with jurisdiction. We also award the costs of the appeal and of the court below to the appellant.

We so order.

Dated and delivered at Nairobi this 3rd day of March, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR