IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 70 OF 2004

BETWEEN

SAVINGS AND LOAN KENYA LIMITED ..... APPELLANT

AND

ONYANCHA BW'OMOTE ..... RESPONDENT

(Appeal from the Judgment and decree of the High Court of Kenya, Nairobi (Mutungi, J) delivered on 10th day of February 2004

in

H.C.C.C. NO.212 OF 2002)

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JUDGMENT OF THE COURT

1. This judgment arises from the appeal to this court from the judgment of the High Court (Mutungi J) delivered at Milimani Commercial Courts at Nairobi on 10th February 2004 in Civil Suit No.212 of 2002 (in favour of the respondent and) against the appellant.

2. Briefly, the appellant, Savings and Loan (K) Ltd sued the respondent,

Onyancha Bw'omote, for recovery of Shs.1,079,485/70 together with compound interest thereon at variable rates from time to time as therein stated.

The appellant's claim arose from a lending transaction in these circumstances; the appellant, a financial institution carrying on business of lending monies to members of the public, advanced to the respondent two separate loans designated as loan account number 201-896-188 and loan account number 201-924-200 which were secured by a charge over a property known as L.R Nairobi/Block 90/364 (hereinafter referred to as "the charged property") owned by the respondent.

4. In May 1999, the respondent, to forestall foreclosure, decided to repay the debt due to the appellant which was secured on the charged property. The respondent through his advocates gave to the appellant's advocates professional undertaking to pay the money due and enquired about its quantum. By mistake said to be a mistake of fact, the appellant advised that the amount outstanding was the sum in loan

account No.201-924-200 which then stood at Kshs.301,494.98. The appellant omitted to include the balance outstanding in loan account No.201-896-188 which then stood at Ksh.678,628.40. The respondent paid to the appellant the amount advised and the appellant discharged the charged property. Later, the appellant contended that it failed to include the loan in the second account due to a bona fide but mistaken belief that the amount due to it had been paid in full while in fact it had not. On discovery of this mistake, the appellant demanded payment of the money in the second loan account and subsequently sued for it when the respondent failed to pay.

In its judgment dismissing the suit, the High Court (Mutungi J) crystallised the issues for determination as follows –

> ***"a. Given the undisputed facts, what is the import and implication of the plaintiff's conduct under the circumstances, and***

b. ***who should bear the legal consequences arising from the answer(s) to (a) above?"***

6. On the issue of mistake of fact the learned judge expressed the following

view –

> ***"My view is that a mistake of fact must be proved, and to discharge that burden, the Plaintiff must show evidence as to how the wrong figure was arrived at before it was advised to the Defendant."***
>
> ***"The plaintiff, in my finding and conclusion, totally failed to prove how it came to advise the defendant of the balance of Ksh.301,495.85. To begin with, I was not satisfied by an allegation that the figure was the outstanding balance in the second loan account alone, and that the balance in the first loan was not taken into account. The cause of my disbelief is that it was upon the first loan of Ksh.670,000/= that property Title Number Nairobi/Block90/311 was charged, and given as security. There is no charge over that property in respect of the second loan. Furthermore, the Defendant's letter of 11.5.1999 requesting for the outstanding amount due to the Plaintiff is clearly headed DISCHARGE OF CHARGE – TITLE NO.NAIROBI/BLOCK 90/311."***
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> ***"My second reason for not believing the Plaintiff's evidence, if any, is that perusing through all the statements of account for A/C No.201924200 attached for the plaintiff's papers, I have failed to locate the figure Ksh.301,494.85. One can't speculate then that the plaintiff picked the wrong figure from the statements of account. Where the figure came from, can only be explained by the plaintiff, who failed both in oral evidence and in the documents filed to prove this crucial fact."***
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> ***"For avoidance of doubt, let me state the point this way. It's the duty of the plaintiff herein to prove, on balances of probability, that in asking for less money than what was due, it made a mistake. That the plaintiff has been unable to demonstrate. The plaintiff has not shown whether it arrived at the figure supplied to the defendant by wrong additions of both accounts, and if so which figures were used, as they don't appear in any of the statement of their accounts in the court file."***

7. The learned judge observed -

> ***"that the transaction of the advice of the balance, leading to the discharge of charge and the return of the documents of title was not carried out by the parties themselves, but through their advocates."***

"whatever figure communicated to the defendant's lawyers, they had given their professional undertaking to pay."

"it is pertinent to recall the undisputed facts, that not only did the defendant request for the balance due and owing, but he – the defendant – went ahead in his letter, to disclose, out of his own transparency, why the balance was required. Upon clearing the balance, the defendant was going to mortgage the same property with Barclays Bank of Kenya Limited, for a different purpose."

8. The learned judge finally delivered himself as follows before dismissing the appellant's suit with costs to the respondent –

   "to hold that the defendant (respondent) still owes the plaintiff

   (appellant) any money, as balance due and owing under these peculiar circumstances lacks basis, either factual or legal or both...."

   "the plaintiff (appellant) has failed to prove that in demanding less than what was due and owing, he made a mistake of fact. However, that mistake if any, clearly was followed by irreversible legal consequences, namely, the charged title was discharged and the title returned to the chargor (respondent) and subsequently, in the belief that the title was not encumbered/mortgaged to another financial institution. That legal situation cannot be reversed without prejudice to the defendant in this case!...

   "Accordingly, I hold that the plaintiff is estopped from contending that the defendant is indebted to it. The mistake, if any, and the consequences therefrom, must be borne by the party which facilitated both such mistake, if any, and the consequences therefrom. Such a party is the plaintiff. This holding disposes of issue number one as herein framed."

9. Aggrieved by the said decision, the appellant lodged this appeal and proffered six grounds of appeal in which it challenged the decision of the High Court and contended that the learned Judge erred in his finding that the appellant had not proved that it advised the respondent of an erroneous balance as outstanding and that the appellant was unable to point at any specific fact about which it was mistaken notwithstanding that it was clear that it was the outstanding balance it advised; that the learned Judged made a fundamental error of law in holding that the appellant was under an obligation to demonstrate how the said error occurred as opposed to demonstrating that the balance it advised was erroneous; that the learned Judge erred in failing to place any significance on the fact that the respondent must have known that the balance communicated to him was erroneous as the statements of accounts admitted in evidence showed a substantially higher amount; that the court failed to appreciate that the respondent's liability to the appellant had not been liquidated by the payment of the erroneous amount; that it was an error for the learned Judge to apply the doctrine of estoppel to deny the appellant the balance of the unpaid debt.

10. When the appeal came up for hearing before us, learned counsel **Mr. W. A. Amoko** appeared for the appellant and learned counsel **Mr. L. M. Ombete** appeared for the respondent.

11. Mr. Amoko adopted his written submissions and amplified the same by submitting that there was no positive pleading on the part of the respondent that the latter had paid all the money owed. He pointed out that only the appellant offered evidence in the trial and that the respondent did not. It was his contention that the facts placed before the trial court by the appellant were not disputed.

He drew our attention to the fact that although the learned judge at the beginning of his impugned judgment appreciated that "the facts in the suit were undisputed," he failed to find, as he should have done, that there was a mistake in the figures communicated to the respondent as the money due, and instead held that "a mistake of fact must be proved, and that to discharge that burden, the plaintiff (i.e. the appellant) must show by evidence how the wrong figure was arrived at before it was advised to the defendant (i.e. the respondent)."

12. Mr. Amoko referred to us the decisions in the following cases: **Hartog v. Colin & Shields** [1939] 3All ER 566; **Coakes v. Beer** [1981-85] All ER 106; **D & C Builders Ltd V. Rees** [1965] 3 All ER 837; **Central London Property Trust Ltd v. High Trees House Ltd** [1956] 1 All ER 256 and **Ajayi V. R. T. Briscoe [Nigeria] Ltd** [1964 All E.R. 356. He also referred to Chitty on Contracts, 25th Edn; and to **Halsbury's Laws of England**, 4th Edn.

13. On the basis of the decision in **Foakes V. Beer**, Mr. Amoko's contention was that the payment by the respondent did not discharge the respondent's liability. Foakes V. Beer concerned an issue as to whether the judgment debtor was liable to pay interest after the debtor had paid the money in accordance with an agreement that did not allude to interest. The court determined the issue on the basis of Section 17 of the English Judgment Act, 1838 which showed that interest on the judgment debt formed part of the debt owed by the appellant to the respondent and that the amount paid under the agreement was less than the judgment debt. It can easily be distinguished from the instant case.

14. The decision in **Central London Property Trust Ltd V. High Trees House Ltd** did not relate to mistake and its legal consequences; it related to payment where there has been a true accord, where a creditor agrees to accept a lesser sum in satisfaction and the debtor acts on that accord. It can be distinguished from the instant appeal in which the issue is whether a mistake was proved that the respondent did not know the figures relating to his full indebtedness and that the figure for less which was communicated to him was due to a mistake of fact on the part of the appellant.

15. The decision in **Ajayi V. R. T. Briscoe** (Nigeria) Ltd was in an appeal to the Privy Counsel from Federal Supreme Court of Nigeria. It concerned promissory estoppel in which one party to a contract in absence of new consideration agrees not to enforce his rights. The court held that "an equity will be raised in favour of the other party" which will be subject to the qualification that "the other party has altered his position and that the promisor can resile from his promise on giving reasonable notice..." That is not the position in the instant appeal and the case is clearly distinguishable.

16. The English Court of Appeal decision in **Avon County Council V. Howlett** [1983] 1 All E. R. 1074 bore on the instant appeal. In that case, the defendant who was injured in course of his employment went on sick leave for two years during which period his employer, the plaintiffs, overpaid him due to a mistake in their computerized system. The plaintiffs sued for recovery of the overpayment. The defendant put up a defence of estoppel in which he contended that the plaintiffs had represented to him that he was entitled to treat the money as his own; that in reliance of that representation he had spent the money; and that the overpayment was not due to any fault on his part. Further, the defendant contended that the money was irrecoverable because it had been paid under a mistake of law and not fact. The Court of Appeal held in its decision on appeal by the defendant that since the plaintiffs had discharged the onus of proving that the overpayment had occurred due to a mistake of fact and not law (since the plaintiffs employees had not fed the correct information into the computer) they were prima facie entitled to recover the full amount of the overpayment.

17. On his part, learned counsel for the respondent, Mr. Ombete opposed the appeal and supported the decision of the High Court. He contended that the appellant was under a duty to prove that there was a mistake of fact because the figure of Shs.1,079,485.70 was not shown to be outstanding in either loan account. He contended that the appellant's witness, Raymond Kipkemoi Tuitoek, did not know how the mistake occurred. He submitted that documents (which included the statements of the accounts) did not constitute evidence that the respondent owed the money. According to counsel, the issue of mutual or unilateral mistake was irrelevant as the two contracts for the loans had been concluded. He pointed out

that the appellant *qua* claimant had failed to discharge its burden of proving existence of mistake of fact that it had been underpaid. He urged us to hold that there was no mistake of fact as there was no proof in this regard. Finally, he contended that as a new charge was registered over the charged property in favour of a new lender following the discharge, the appellant is not entitled to make the claim it has made. He concluded his submissions by stating that the alleged shortfall was a simple debt and not money secured under a charge and for that reason interest calculated on it on the basis of the charge was wrong. He urged us to dismiss the appeal.

18. Do the facts and circumstances in this appeal disclose a mistake of fact or a mistake of law on the part of the appellant in communicating a smaller and incorrect figure of the debt due by the respondent to the appellant?

19. The distinction between a mistake of law and a mistake of fact is slim. As a digression, sight must not be lost to the fact that the distinction has been the subject of criticism by English courts and authors of law books (see Goff and Jone's **Law of Restitution** (2nd Edn, 1978, pg 91). In **Allcard V. Walker** [1896] 2 Ch.369 at pg 381 Sterling J observed that "it is not accurate to say that relief can never be given in respect of a mistake of law. It was laid down by Turner LJ in **Stone V. Godfrey** 5D. M. & G. 76, 90, that this court has power to relieve against mistakes of law as well as against mistakes of fact, and this statement was recognized in the judgments of the members of the Court of Appeal in **Rogers V. Ingham** 3 Ch.D.351, 357 and particularly by Mellish LJ who refers to it and explains it thus: *"that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it"*. The court in ALLCARD's Case (supra) expressed the view that *"no doubt the jurisdiction is one to be carefully exercised and the facts in each case must be closely scrutinized to see which way the equity lies..."*

20. In law, the party claiming the money paid by mistake assumes the burden of showing that the payment was due to a mistake of fact: and the standard of proof is on the balance of probabilities in all the circumstances of the case; that it was the mistake of fact which gave rise to the overpayment. The principle holds true where the money claimed is the balance of a debt which (debt) is partially paid as a result of a mistake of fact in communicating the actual amount of the debt due.

21. The record of appeal shows that the appellant maintained in respect of the respondent two loan accounts Nos.201-896-188 and 201-924-200, a fact that was known to both parties. The respondent through his advocates gave notice to repay the debt then due and owing by him to the appellant. The appellant claims that it made a mistake of fact in advising the respondent that the balance of the debt due was Shs.301,494.98 in account No.201-924-200 and that it unknowingly omitted to include the balance outstanding in loan account No.201-896-188 which then had a balance of Shs.678,628.40. The respondent paid the amount advised and the appellant discharged the security. Subsequently, the appellant discovered the mistake it had made and immediately advised the respondent of the correct position and demanded payment of Shs.678,628.40 in A/C 201-896-188. The exchanges relating to the balance of the debt due involved the advocates for the appellant and the respondent.

22. The evidence shows that the appellant through mishap failed or forgot to check the second account reflecting Shs.678,628.40. There is no doubt that the unpaid amount was owing. The mistake by the appellant in not checking both accounts to establish the respondent's full indebtedness was not a mistake of law. It related to the question whether the respondent had one or two or more accounts and the quantum of the unpaid balance. The appellant made a mistake which resulted in its receiving less money than it was owed. That certainly was a mistake of fact. No doubt, if the appellant's staff had been a little more circumspect in their work, the mistake would not have occurred. But the respondent does not deny that the sum not advised to his advocates in the second loan account was owed by him. His beef is with regard to interest claimed which has accrued and which would have been avoided but for the appellant's mistake.

23. Hasbury's Laws of England 1956 Vol 1 Paras 68-70 states that generally, mere negligence on the part of the payer is not a bar to the recovery of money paid. However, where there has been breach of duty or misrepresentation on the plaintiff's part which misled the defendant and caused him to alter his position in reliance on the plaintiff's conduct in a way which would make it inequitable to require him to repay the money, the plaintiff may be estopped from asserting his right to repayment (see **United Overseas Bank V. Jiwan**i [1972] 1 All ER 733 at pg 739). In the absence of such breach or misrepresentation, the mere fact that the defendant cannot be put in the same position as before the money was paid is not a bar to recovery.

24. It is a fair inference from the facts and on the balance of probabilities that the reason why the appellant advised the respondent to pay the debt in one account and not in both accounts was because the appellant's staff either were unaware of the second account or had forgotten that the respondent had two accounts. It is plain to see that it was a mistake of fact rather than a mistake of law. We so find.

25. The decision in **Barclays Bank V. W. J. Simms Ltd** [1980] 1 QB 677 buttresses the proposition that money paid under a mistake of fact was prima facie recoverable, provided that the payer did not intend the payee to have the money in any event, the money was not paid for good consideration, and the payee had not in good faith changed his position; in that case, the customer stopped payment of a cheque it had given but the Bank's official overlooked the stop instructions and made payment to the payee. The Bank demanded repayment of the money from the payee but the latter refused to make repayment, hence the suit by the Bank seeking repayment.

26. In the American case of **Southwick V First Nat. Bank** 84 N. Y. 420 this issue was further discussed and it was determined that not every mistake of fact will lay the ground work for relief. The mistake has to be of some existing fact, not something to happen or to be done in the future. It must be a mistake as to some fact directly bearing upon the act against which the relief is sought and not a remote one. The test of whether the mistake was an intrinsic one or an extrinsic fact (remote fact) was discussed in **McArthur v Luce**, 43 Mich.435. The mistake must be one about which the claimant was not in doubt as at the time of payment. The appellant in the instant appeal made it clear that it gave the advise of the balance and believed it to be true and only discovered the error later, when it wrote to the respondent to make him aware of the situation.

27. A claimant's claim rests on the fact of the defendant being

unjustly enriched or unjustly profiting at the claimant's expense due to a mistake. In the instant case, the appellant went on to discharge the property. It lost its security over the full debt. The respondent can be said, therefore, to have benefited by not paying money he owed in the second loan account and to have received the discharge before the full indebtedness had been discharged.

28. Where there is an understatement of balance due, as in this case, it seems to us inequitable and unjust for the respondent to pay a less amount than is due, especially where the demand was made and the debtor was made aware of the error. The second loan account in this appeal was well within the knowledge of the respondent as he continued receiving bank statements on that account after the first loan account was closed.

29. In the Canadian Case of **Glasner v. Royal Lepage Real Estate Services Ltd.,** 1992 CanLII 975 (BC SC)[2] it was held that:

> **"Equity will relieve against performance of a contract obtained by a party who knew the other side was mistaken about a material fact and who took advantage of that mistake."**

Although the issue was about a contract, the principle remains the same in the context such as in the instant appeal.

30. In light of this, the money due by the respondent in the second account is recoverable. We so find.

31. In our view, in the circumstances obtaining in this appeal, it would be inequitable and antithetical to fairness and justice to require the respondent to pay interest on the money in the second account which has hitherto accrued on it. In the plaint before the High Court,

the appellant pleaded in paragraph 4 that as at 11th May 1999 when the appellant advised that the balance in A/C 201-924-200 was Shs.301,494.98 (which the respondent paid) the second account No.201-896-188 had a balance of Shs.678,628.40. If the appellant had eschewed making the mistake it made, the liability of the respondent would not have escalated beyond the sum of Shs.678,628.40 as there is no evidence that the respondent would not have liquidated both loans in the two accounts.. Equity demands that the appellant's mistake should not result in injury to the respondent. The appellant should not be treated as if its mistake has no consequences. It would be inequitable to require the respondent to pay interest that has accrued due on the loan beyond 31st May 1999, the date when the respondent liquidated the balance in the first loan account. We so find.

32. In the result we allow the appeal and set aside the High Court judgment and in its place enter judgment for the appellant on the terms that the respondent shall pay to the appellant the sum of Shs.678,628.40 plus interest on that sum at the rate of 26% per annum for the period only between 11th May 1999 and 31st May 1999 when the security was discharged. There shall be interest at court rates on

judgment sum (Shs.688,296/=) from the date hereof until full payment.

33. Each party shall pay its own costs of this appeal but costs of the High Court shall be paid by the appellant to the respondent as per the order of the trial Judge.

Dated and delivered at Nairobi this *11th day of March 2016*.

G. B. M. KARIUKI SC

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

S. G. KAIRU FCI Arb

JUDGE OF APPEAL

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

DEPUTY REGISTRAR