



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 79 OF 2014

BETWEEN

OSMAN HUSSEIN MOHAMMED. APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

(Being an appeal from part of Judgment and decree of the High Court of Kenya at Nairobi (G. Odunga, J.) dated 14th day of February, 2013

in

H.C.C.C. & Tax Division C. C. No. 163 of 2013)

JUDGMENT OF THE COURT

The respondent made specific claims against the appellant in its suit that was tried, first by **Mugo, J.**, who heard the evidence of the respondent, and subsequently by **Odunga, J.**, who heard the appellant and thereafter rendered the judgment that is the subject of this appeal. The respondent claimed that the appellant, who was its customer applied for and was granted an overdraft facility in the sum of Kshs. 195,000.00 on the security of parcel of land, L.R NO 13673/35; that he defaulted in the repayment; that as at 31st December,1996 he owed the respondent Kshs. 1,156,331.10 together with interest at 47.5% per annum from 31st December,1996; and that despite demand made to the appellant, he had failed to settle the facility. The respondent therefore sought in that suit to recover Kshs. 1,156,331.10, interest at 47.5% per annum from 31st December, 1996 until payment in full, as well as costs of the suit.

In response to these claims the appellant denied being indebted to the respondent contending instead, in his counter-claim that the former only advanced him Kshs. 195,000.00 which he had fully settled, and that the respondent without reasonable cause had failed to discharge his property, L.R 13139/516, Mandera. As a result he prayed for a declaration that he had fully paid the loan and an order directing the respondent to discharge the aforesaid property.

Before **Mugo, J.**, the respondent, through Anthony Nzioka Kyalo, its Credit Analyst, confirmed that although he had not been employed by the respondent at the time the overdraft facility was extended to the appellant, he was however versed with the transaction from the record held by the respondent. He

explained that the appellant applied for an enhanced overdraft of Kshs. 80,000.00 on 22nd March, 1993, to top up an existing facility of Kshs. 200,000.00 translating to an overall total of Kshs. 280,000.00. The facility, according to the witness was to be secured by title No. L. R. No. 13139/516. He further explained that the existing facility had been secured by L. R. No. 13673/35. The appellant's application for the facility was granted meaning the total facility extended was Kshs. 275,000.00, (that is, Kshs. 80,000.00 + Kshs.195,000.00).

A charge was drawn and executed on 8th, April, 199. It provided for the interest rate of 19.5% and 22.5% over the limit. The respondent alleged that the appellant defaulted in servicing the facility despite many promises and proposals to no avail, prompting the respondent to institute H.C.C.C. No. 163 of 2013 to recover the outstanding sums. The witness, as we shall shortly see, had difficulties in stating the precise amount due from the appellant, explaining that the relevant records had been destroyed in a fire that burnt down their offices.

Before **Odunga, J.**, the appellant, through a Somali interpreter traced and outlined his relationship with the respondent, as its customer from 1972/73. He recalled of two loans of Kshs. 200,000.00 and Kshs.195,000.00 (total Kshs. 395,000.00) advanced to him in 1993 and secured by a title document of his land in Mandera, the details of which he could not remember. His main complaint was that the respondent never supplied him with the statement of the account. He was however emphatic that he settled the facility in full, hence his prayer in the counter-claim that the charge be discharged.

The learned Judge after evaluating the evidence by both sides framed nine issues, over and above those framed and agreed by the parties. In our estimation, however, the combined effect of all the framed issues is the question whether the appellant owed the respondent Kshs. 1,156,331.10 together with interest at the rate of 47.5%. There was consensus that the appellant was advanced an overdraft facility. The only sticking point was whether the debt was fully settled and if not how much did the appellant owe the respondent; whether it was Kshs. 1,565,871.45, Kshs. 1,156,331.10 or Kshs. 409,406.21; and whether the figure, whichever it was, included 47.5% or 19.5% interest rate.

At the conclusion of the trial, the learned Judge, for want of proof, was unable to find for the respondent that the appellant owed it any money. In the same breath he was also not persuaded by the appellant's evidence that he had settled in full the loan he had himself admitted to have been advanced. Ultimately the learned Judge found no basis to discharge the appellant's title documents, and proceeded to dismiss both the respondent's suit and the appellant's counter-claim with no orders as to costs.

The appellant now challenges that decision, which effectively allowed the respondent to continue holding the certificate of title to his property, arguing that the learned Judge erred in holding that there was no evidence that the appellant had fully repaid the facility, when it was clear from the bank statements produced in evidence, as well as the evidence of the respondent's witness, that the payments had been fully made; and that, contrary to the finding by the learned Judge, at no time did the appellant admit his indebtedness to the respondent.

The **Evidence Act** and the **Civil Procedure Rules** govern, within the framework of the law, how the courts conduct trial of cases. Each party, relying on his pleading, presents his case in sufficient detail by calling relevant evidence to prove, on a balance of probabilities that a certain situation exists. It follows that, the most important aspect of a case is usually the evidence, as no case is won without evidence meeting the relevant threshold to support the pleadings. That is why at the beginning of this judgment we stated that the respondent made specific claims against the appellant and the appellant likewise, in his counter-claim alleged certain things against the respondent. It was expected that, at the trial they would present proof of those claims and amendments.

Starting with the respondent, it was its case, according to the plaint, that the appellant was indebted to it in the sum of Kshs. 1,156,331.10, being the overdraft and interest thereon at 47.5%. It called evidence through Anthony Nzioka Kyalo that the appellant had an existing overdraft facility which stood at Kshs.80,000.00 at the time he applied for its enhancement by additional Kshs. 195,000.00. That evidence was not seriously controverted. As a matter of fact the appellant was in agreement to the extent that, in

1993 he was granted Kshs.200,000.00 and later additional Kshs.195,000.00 The burden thereafter was on the respondent to demonstrate how Kshs. 275,000 (i.e. Kshs. 195,000.00 + Kshs. 80,000.00), escalated to Kshs. 1,156,331.10. Anthony Nzioka Kyalo presented this evidence in explanation. He said;

“According to the information in the bank records the customer enjoyed the overdraft facility but did not service the same.....the account as at 30th January 2010 had a balance of Kshs. 409,406.21 still outstanding as debt balance . That is the amount the plaintiff wishes to recover from the defendant.....I pray that the court finds that the debt is still outstanding and the payment remains Kshs. 1,565,871, being the amount at the time of writing down the loan. Interest is also prayed for at the rate of 47.5%.” (our own emphasis)

On cross-examination he went on,

“The defendant drew the money on dates I cannot confirm. The documents I have do not show that. The facility stops on the expiry date. In this case the facility existed upto 31/12/1994. As at the time the Defendant had overdrawn Kshs. 346,780.00. The records do not contain a statement. The records were in our archives and were burnt. The statements relating to this account for the period 1994 were among the ones that burnt. The only statements available are from 2001 as those ones were at the branch. There is no document to correct (sic) those statements and the previous ones. I do not have any statements for the period 1997.” (our own emphasis)

Although the burden was on the respondent, not only to demonstrate that the appellant owed it money but also that the sum owed at the time the case was presented was Kshs1,156,331.10, it merely, as it were, threw different figures at the learned trial Judge. Was the sum owed Kshs. 1,156,871.00, 1,565,871.00, Kshs. 409,406.21 or Kshs. 346,780.00? The primary purpose of pleadings, as was recently reiterated in **Mohamed Fugicha v Methodist Church in Kenya (Suing thro’ its Registered Trustees** , Civil Appeal No. 22 of 2015, is to;

“...communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer”

The appellant prepared his statement of defence with the figure specified in the plaint in mind. He was, no doubt embarrassed and prejudiced at the trial, not knowing what to rebut. It was not only the figures that were confusing but the respondent could also not tell on what dates the appellant drew the money, or even the amounts. The respondent’s witness was not certain whether the respondent was in possession of the right title deed, or whether the borrower was the appellant or some other person. He stated, in that regard as follows;

“Of the three titles L. R. No. 4957/1, 4957 and 4952/2 we charged the property known as L.R. 4957. I can confirm that we are holding grant number 4957. It would mean that what we are holding is not what was charged. I am not sure if that could explain the differences in the overdraft documents and statements.

The offer letter at page 4 of the bundle talks of overdraft of Kshs.280,000.00 and a property number 13673/35 as security. I don’t not have the records for that property but I believe the bank should be having it. It is not part of the documents produced in court.....

The letter is addressed to Osman Mohamed Hussein. The property we charged as appearing at page 5 belonged to Sheikh Osman Mohamed. I would say he is the Defendant who in the plaint is Osman Mohamed Hussein.”

With these and other gaps, it would have been a miracle if any other decision was reached by the learned

Judge, apart from that dismissing the suit.

We turn to consider the appellant's case contained in the counter-claim wherein he asserted that he had paid in full Kshs.195,000.00 together with the interest owed to the respondent. That, once again, is specific plea. Did the appellant, having made such a categorical statement offer some proof? The appellant conceded that he enjoyed some overdraft facilities and that is why the title deed to his land was in the possession of the respondent. He however insisted that he had fully paid up the debt. Before the trial court, he could not remember the account number. He did not produce a single document to prove the contention that he had repaid the loan. Instead he seeks, as it were, to take piggy back ride on the evidence of the respondent's witness, who confirmed that the bank statement reflected payment of Kshs. 1,205,871.00 from the appellant, leaving a balance of Kshs. 360,000.00 which was also settled on 19th July, 2003 resulting ultimately in a zero balance.

Although figures in a statement mean very little if not explained by a party wishing to rely on them, particularly where they are in dispute, in this case the appellant, who confessed he was illiterate, complained that he had never been furnished with the statement of his account. The respondent's witness gave various figures as the debt owed by the appellant, among them Kshs. 1,565,871.00. From the statement produced and by the witness own admission, after the payment of Kshs. 1,205,871.00 and Kshs. 360,000.00 the balance on the account read zero (0), and the amount (Kshs. 1,565,871.00) allegedly owed by the appellant was settled. It is apparent that the payments were made nearly five (5) years after the suit had been filed. Had the learned Judge properly evaluated the entire evidence, it would have been obvious that the two payments were intended to off-set the debt and accordingly he would have entered judgment in the counter-claim and ordered the discharge of the charge.

In the result we allow the appeal and set aside the order dismissing the appellant's counter-claim and in place thereof substitute an order declaring that the appellant fully settled the debt with the respondent and order the discharge of the charge. Costs in the court below and in this appeal are awarded to the appellant.

Dated and delivered at Nairobi this 4th day of November, 2016

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR