



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MWILU & KIAGE, J.J.A

CIVIL APPEAL NO. 258 OF 2006

BETWEEN

BARCLAYS BANK OF KENYA LIMITED.....APPELLANT

AND

PATRIOTIC GUARDS LIMITED.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nairobi (Kasango, J.) dated 16th February, 2006

in

HCCC NO. 838 OF 2000)

JUDGMENT OF THE COURT

The transaction giving rise to the litigation herein culminating in this appeal can be described as fraud per excellence.

Titus Koech Kigen, the managing director of **Patriotic Guards Limited (respondent)** was sometime in 1999 approached by his former landlord, one Veejay and asked if he was interested in purchasing a residential property. He expressed his interest and he was taken to view a property on a half-acre plot in the upmarket Hurlingham area. He liked the property and a meeting was arranged for him to meet the owner and his authorised estate agent. The authorised agent was Mike Muoki while the person said to be managing the property was a white man referred to as Rudolph.

At the meeting, the purchase price was agreed upon as Kshs. 8,000,000/= with the cost of renovations and repairs being set at Kshs 600,000/=. A meeting with the owner of the house who was said to reside in Uganda was arranged. According to Mr. Kigen ,at the meeting he confirmed the identity of the owner through a Ugandan passport which bore his passport photograph and which also had an immigration stamp indicating that the holder of the passport had entered into the country recently.

The purported owner was introduced as Iburaim Kironde Kabanda. He agreed to the terms of sale and a sale agreement was entered into between Mr. Kigen on behalf of the respondent and the said Iburaim Kabanda as the vendor. A down payment amount of Kshs. 900,000/=being 10% of the purchase price was paid on execution of the said agreement. The money was paid in the presence of the advocate

– one Evans Monari who also witnessed the agreement.

The completion date of the agreement was agreed on as 60 days from the date of execution of the agreement. According to the respondent, he had 3 million shillings and so he approached his bank – Barclays Bank of Kenya Limited (Appellant) for the balance of the sale price. The Bank agreed to advance the respondent Kshs. 5,000,000/= (5 Million) with the suit property to be used as security for the amount. What is interesting however, is that this amount like the earlier one was paid to the vendor in cash.

Before the money was paid out, the bank handed over the documents to their lawyers, Waruhiu, K’owande & Ng’an’ga to conduct due diligence on the Title to the suit property. The lawyers gave the property a clean bill of health and so the appellant

prepared the mortgage document which was duly executed by the respondent herein. It was in the process of registering the mortgage at the company registry that it was discovered that the documents presented to the respondent and subsequently to the appellant were forgeries. The property did not belong to the purported vendor. The matter was reported to the police and investigations were commenced. Some of the people involved were arrested and criminal proceedings were commenced against them.

That however is not of concern to us for purposes of this judgment.

The respondent made a few payments on its loan account but defaulted after paying for five months. This transaction left the appellant with a loss of its money while the respondent was also left with neither the house nor the money.

The respondent moved to court on 8th May, 2000 by way of plaint claiming several reliefs as against the appellant. The plaint was amended on 7th July, 2000 by consent of both parties. The amended plaint was re-amended and the re-amended plaint was filed on 10th May, 2005 by the firm of Satish Gautama who described himself as ‘Advocate for the Plaintiff’.

This re-amended plaint is the subject of grounds 1 and 2 of the memorandum of appeal. We shall revert to this issue later on.

After close of the pleadings, the matter proceeded to hearing before Kasango, J who rendered the impugned judgment on 16th February 2006 in which she dismissed both the plaintiff’s case and the defendant’s counterclaim with no award for costs given to either party. That judgment is the subject of this appeal in which the appellant, through Walker Kontos Advocates has proffered ten grounds of appeal as hereunder:-

- “(1) Judge erred in law in holding that Re-amended Plaint filed by the firm of Satish Gautama Advocate was properly on record despite the fact that said advocate’s firm had not filed a Notice of Change of Advocates.*
- 2. The Judge erred in law by failing to hold that a lead counsel cannot file any documents in court in his own firm’s name if a Notice of Change of Advocates had not been filed.*
- 3. The Judge erred in law and in fact in holding that there was a reply to the counterclaim filed on 7th July 2000 while in actual fact there was no reply and defence to further amended defence and counterclaim dated 3rd May 2005 and filed on 10th May 2005.*
- 4. The Judge erred in law by deciding on her own motion on an issue regarding Regulation 79 of Table A of the Companies Act whose purported non-compliance led to the invalidation of the loan which said issue was not part of the pleadings or issues raised by the parties to the suit.*
- 5. The Judge erred in fact by holding that only one sheet of the statement of account No. 2572835*

was produced of the Appellant's List of Documents dated 6th February, 2003 and failed to take into account the rest of the statements of account which formed part of the appellant's evidence that clearly demonstrated how the loan was serviced.

- 6. The Judge erred in law and in fact by failing to take into consideration the evidence of the appellant's witness who gave an account of how the debt was serviced until the time of default.*
- 7. The Judge erred in law and in fact by finding that the sum of Kshs. 4,772,312.00/= was not proved because only one statement of account was produced despite the fact that the debt was admitted by the respondent.*
- 8. The Judge erred in law and in fact by failing to take into account the evidence of the respondent's witness who admitted that the sum of Kshs. 5 million was lent and that by a letter dated 18th February 2000 the respondent agreed to abide by the agreement to repay the debt.*
- 9. The Judge erred in law by failing to enter judgment in favour of the appellant, based on the merits of the appellant's case, for the balance of the loan after taking into consideration the repayments that had been made by the respondent.*
- 10. The Judge erred in law in failing to hold that the respondent was contractually bound to refund the money it admitted owing."*

When urging the appeal before us, Mr. Karungo, learned counsel appearing for the appellant faulted the learned Judge for dismissing the counterclaim saying that the same had been proved to the required standard as the loan had indeed been admitted. He challenged the validity of the re-amended plaint on the basis that Satish Gautama, who filed it had not filed a notice of change of advocates, and that a lead counsel cannot file documents in his name. He submitted that the learned Judge erred in her finding that there was no reply to the further amended defence and counterclaim filed on 10th May, 2005.

It was learned counsel's submission also that the learned Judge should not have *suo motu* raised the issue of the appellant's noncompliance with Regulation **79 of Table A of the Companies Act**, as the issue had neither been raised in the pleadings nor had it been canvassed during the hearing. In counsel's view, it was the duty of the borrower to draw the Bank's attention to the fact that it had no capacity to borrow the five million shillings and not the converse. Counsel wrapped up his submissions by emphasising that had the learned Judge considered all the evidence before the court in its entirety, she would not have dismissed the appellant's counterclaim. He urged us to allow the appeal set aside the impugned judgment and enter judgment as prayed in the further amended defence and counterclaim dated 3rd May, 2005.

Although duly served with the hearing notice, Wachakana & Co. Advocates on record for the respondent did not appear in court to oppose this appeal. The appeal was therefore heard in their absence.

The facts in this case as recapitulated above are largely uncontested. Indeed we observe that, there is stipulation on the part of the respondent of the fact that his company was granted the loan facility of five million. The respondent does not deny either that the company made the necessary arrangements to repay the loan and even paid a few installments before deciding to challenge the same by way of the suit before the High Court.

The main ground on which this challenge was based is that there was a total lack of consideration in the contract between the parties as the purpose for which the loan was advanced was never realized. This was on account of the conveyance being predicated on documents that later turned out to be forged. It was the respondent's contention that had the appellant's advocates carried out proper due diligence on the property, they would have discovered that the title documents presented to it were forgeries. The respondent thus lays the entire blame for the frustration of the contract at the doorsteps of the appellant. The respondent therefore sought orders of injunction against the appellant to stop it from recovering the said loan, and further for a refund of the payments already paid to the appellant on account of the said loan; money paid for registration and other expenses in respect of the said transaction plus interest

thereon.

The respondent also sought a declaration to the effect that the guarantees executed by the respondent's directors were void for want of consideration. On its part, the appellant in its defence blamed the respondent's Managing Director for presenting to its advocates a charge document which appeared genuine and on which the advocates proceeded to prepare the mortgage and release the Ksh. 5 million to the respondent. It was the appellant's evidence before the court that the respondent had given an undertaking to pay the amount in question and even proceeded to pay by installments but defaulted after a few installments. This undertaking was given vide the letter dated 18th February, 2000.

The appellant therefore counterclaimed for the balance of the loan amounting to Kshs 4,772,312 or in the alternative for damages for fraud and breach of duty on the part of the respondent. After hearing the parties, the learned Judge rendered the judgment dated 16th February, 2006 in which she made several findings before ultimately dismissing both the respondent's case and the appellants counterclaim giving rise to this appeal.

We shall now examine this judgment vis-a-vis the grounds of appeal before us and learned counsel's submissions summarised earlier on in this judgment. The first finding by the learned Judge was that the respondent was not entitled to the prayer it sought because the appellant (Bank) ***“was not seeking to enforce the charge but the***

contract dated 1st December 1999, the letter of offer”. The learned Judge found no culpability on the part of the appellant's advocates who had confirmed the charge documents as valid. She concluded in her judgment that:-

“I therefore find that the orders sought to stop recovery of the loan and the application of interest has not been proved on a balance of probability.

Further in the judgment, at page 14, the learned Judge made the following finding:-

“The Court's find (sic) is that the plaintiff was granted the said loan.”

After making that finding, the Judge went on to consider whether the Bank was entitled to claim the amount outstanding on the loan. The Judge found that the Bank had failed to prove the respondent's indebtedness because according to her, the Bank had based its claim on a specific date i.e 5th December 1999 yet only one sheet of the banking statement had been produced in support of the claim, which statement started with entries from 15th December 1999.

Unfortunately, we find ourselves in difficulty when re-analyzing this bit of evidence. We say so because the bank statement at page 198 of the record of appeal where the dates in question appear was punctured in the process of the binding process and we cannot see the exact date.

That notwithstanding however, first and foremost, we appreciate that indeed, the bank statement was not only one page as indicted by the learned Judge but several pages as can be seen from pages 198 – 202 of the Record of Appeal. Ground five of the memorandum of appeal is therefore valid and we uphold the same.

Flowing from that is the submission by learned counsel for the appellant as to whether the learned Judge was justified in failing to consider the entirety of the evidence placed before the court before arriving at the conclusion that the appellant had not proved that the loan was owed.

On this note we remind ourselves of our duty as a first appellate Court to re-evaluate the evidence and re-appraise the same with a fresh independent mind to enable us come to our own independent conclusion. This duty is clearly espoused in

Rule 29(1) of this Court's Rules and which rule we have dutifully applied in many appeals that have been heard by this Court over the years (see for example Selle vs

Associated Motor Boat Company Limited [1968] EA 123,

As stated earlier, the facts surrounding the transaction between the parties herein are largely undisputed.

In our view, the main issue in both the plaint and the counterclaim was not whether the 5 million was advanced to the respondent and if so, whether the same was repaid or not. The issue is whether the same can be claimed from the respondent. From the further amended defence and counterclaim dated 3rd May 2005, the appellant stated that it released the loan to the respondent 'on or about 5th December, 1999 by crediting it in its account'.

The respondent never at any one time denied in its pleadings or evidence having applied for the loan facility, or that the appellant issued the letter of offer dated 1st December 1999 in which it agreed to advance the respondent the 5 million. Indeed, the Respondent's Managing Director, Mr. Titus Koech Kigen, who testified on behalf of the company, admitted that the 5 million shillings was given to the alleged owner of the house, who even purported to give the respondent vacant possession of the house.

Indeed the respondent even made arrangements to service the loan by way of monthly standing orders for Kshs 140,000/= which he paid even after discovering that the title documents were forgeries. The respondent by letter dated 18th February 2000 undertook to continue servicing the loan two months after he had discovered the fraud committed against him.

He said in the said letter:-

"I would like to also inform you that I am making arrangements for a new security but I would like to stress at this moment that I will respect all arrangements that I have with the bank including the repayments of the loan as you assist me to uncover the truth about this mystery...."

It is not clear when he changed his mind and decided not to service the loan. His defence was that there was no consideration for the loan and so the contract was frustrated as the loan was not applied to the purpose for which it had been borrowed.

He also blamed the appellant's lawyers saying that if they had not confirmed to the bank by their letter dated 14th December 1999 that the Title documents were in order, then the appellant could not have released the money. The learned Judge rejected this argument and therefore proceeded to dismiss the respondent's case. She also made a finding to the effect that the plaint was also for dismissal for the reason that the summons was defective. The learned Judge did however analyse and consider the substantive evidence before her and the dismissal of the plaint was not for the only reason that the summons was defective.

We cannot therefore say that the learned Judge failed to consider all this evidence – otherwise she could not have dismissed the respondent's case which she actually did. What is rather confusing however, which is what has actually aggrieved the appellant is that even after the learned Judge made a finding to the effect that the letter of offer and acceptance formed a contract which was enforceable, she went ahead to dismiss the counterclaim. It is clear from the judgment that the main reason why the counterclaim was dismissed was on account of the respondent's noncompliance with **Regulation 79 of Table A of the Companies Act.**

That being so, we find it important to reproduce the said provision as hereunder:-

"The directors may exercise all the powers of the company to borrow money, and to mortgage or charge its undertaking property and uncalled capital, or any part thereof,

and to issued debentures, debenture stock, and other securities whether outright or as security for any debt, liability or obligation of the company or of any third part.

Provided that the amount for the time being remaining undischarged of moneys borrowed or secured by the directors as aforesaid (.....) shall not any time, without the previous sanction of the company in general meetings, exceed the nominal amount of the share capital of the company for the time being issued, but nevertheless no lender of other person dealing with the company shall be concerned to see or inquire whether this limit is observed. No debt incurred or security given in excess of such limit shall be invalid or ineffectual except in the case of express notice to lender or the recipient of the security at the time when the debt was incurred or security given that the limit hereby imposed had been or was thereby exceeded.”

According to learned counsel for the appellant, that issue was never raised in the pleadings and nor was it canvassed by the parties during the hearing. The learned Judge ought not to have raised it *suo motu* and used it to dismiss the counterclaim. That argument forms the basis of ground 4 of the memorandum of appeal. It was learned counsel’s submission that had the learned Judge considered all these issues holistically, she would have arrived at the irresistible finding that the appellant had proved its counterclaim on a balance of probabilities and entered judgment in its favour for the balance of the unpaid loan.

As stated earlier, our duty is not restricted to upholding or rejecting the trial court’s findings. We shall therefore examine all this evidence along with the grounds of appeal raised and submissions of counsel and arrive at our own independent decision.

The first issue which we need to address is whether there was a binding contract between the parties herein. According to the learned Judge, the letter of offer coupled with the acceptance and release of the money to the respondent constituted a binding contract. In our view, those were only two of the essential ingredients of a contract. One other essential of a valid contract is a meeting of minds by the parties (*consensus-ad idem*). In this case the consensus was that the money loaned to the respondent was meant to go towards the purchase of the house the respondent was purchasing. Indeed the parties had further agreed that the same property was to be used as the security for the said loan.

Another important essential of a contract is that there has to be consideration which has to be lawful. In this case the consideration for the loan was the house which was supposed to be mortgaged to secure the loan.

The law goes further and requires that an agreement may become a valid contract only if it is for a lawful consideration and for a lawful object. If for instance, an agreement is based on a consideration or an object that is illegal; or it is forbidden by law; it is immoral; it is fraudulent or is against public policy, then such a contract cannot be valid in law. Every contract must also be capable of performance. An agreement to do an impossible act whether physically or legally is void.

Lastly, if an agreement does not comply with the necessary legal formalities, then it cannot be enforced by law.

The agreement or contract between the respondent and the appellant has to be measured against these broad parameters. Does it pass the test? There was the offer;

there was the acceptance; there was anticipated consideration which could only crystallize upon the charge/ mortgage being registered in favour of the appellant.

In this case, the consideration never crystallized. We say so because the sale of the house was found to be fraudulent and the house could not therefore be used as the consideration as anticipated.

At that point, the agreement between the parties became void and consequently unenforceable by either

party. The appellant appears to take leverage on the fact that the respondent acknowledged the debt and even started paying the loan. Our view of this is that the said admission cannot be used against him. He may not have appreciated the legal implications involved, or he just felt as a conscionable human being that he ought to pay. He cannot however be penalized for that as his well-intentioned action did not sanitise the illegality in the form of the contract.

The other issue which falls for our determination, which the learned Judge also dealt with, is who was to blame for the frustration of the contract. The respondent has blamed the appellant's counsel for not doing proper due diligence on the said title before advising the appellant to release the money. The appellant on the other hand blames the respondent.

We find that both parties were actually duped as the documents at the lands office appeared to have been genuine and proper. It should not be forgotten that the respondent had checked the documents at the lands office before paying the initial 10% deposit. He too lost some 3 million shillings in that transaction. He can only blame himself for that. We agree however, that the respondent only released the money upon receiving the letter from its advocates dated 14th Dec. 1999 confirming that the mortgage had already been registered and that the title was clear and free from all encumbrances.

It was not the search by the respondent that caused the money to be released, but rather the assurance by the Bank's advocates. If therefore we were to apportion blame, then the appellant through its advocates should carry the heavier portion of the blame. The long and short of this argument is that the contract was frustrated albeit by fraudsters who are not parties to these proceedings. We do not therefore agree with the learned judge that there was an enforceable agreement between the parties herein.

There having been no valid, enforceable contract between the parties, no claim based on that contract would succeed. The only order the court could have made was the declaration sought by the plaintiff to the effect that the contract in question was void and thus unenforceable.

As stated earlier on, the fraud that frustrated the contract was perpetrated by third parties. Both parties herein acted in good faith and were only innocently caught in the fraudsters' snare. They both lost money in the transaction and the loss should be allowed to rest where it lies.

In our view, and flowing from our findings above, the non-compliance or otherwise with **Regulation 79 of Table A of the Companies Act** was really a non-issue and could not have impacted on the court's findings. That ground of appeal in the circumstances becomes moot and we don't need to consider it for purposes of determining this appeal. We would however like to state that although generally parties are bound by their pleadings, where an issue is raised in the course of the hearing and the same is canvassed by both parties, the court would be in order to make a determination on such a matter and even give orders based on such an issue. (**See Odd Jobs Mubia (1974) EA 476 CA.**)

It is also trite law that a point of law can be raised at any stage, even on appeal even though not raised before the court of first instance. The court can also on its own motion raise a point of law at any point and make a determination based on the same even where such point has not been canvassed by the parties. The learned Judge did not therefore do anything outrageous by raising the issue of non-compliance of Regulation 79 of Table A of the companies Act and acting on it.

In conclusion, we wish to observe that the transaction herein was done in great haste, and both sides appear to have been over anxious to conclude it. The respondent ought to have become circumspect when the vendor asked to be paid millions of shillings in cash and yet he was not even Kenyan and tracing him thereafter would have been difficult.

The appellant too ought not to have released the money before the entire registration process was completed. It makes sense to always err on the side of caution. We do hope that they both learnt a valuable lesson from that encounter.

On the peripheral issue as to whether the Re-amended plaint was properly before the court having been

filed by counsel who was not on record, we wish to point out that unless lead counsel has filed a notice of appointment in a matter, then he ought not to file pleadings in his/her names. We do note however that no prejudice was occasioned to the appellant herein by the court not striking out the plaint in question. In any event there was still on record the amended plaint which the plaintiff could have fallen back on and which had prayers that were sufficient to dispose of the matter. We need not say more.

Our ultimate finding is that this appeal fails in its entirety. We dismiss it with no orders as to costs.

Dated and delivered at Nairobi this 30th day of January, 2015.

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR