IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & M'INOTI, JJA)

CIVIL APPEAL NO. 58 OF 2003

BETWEEN

MUTHURU BAY FISHERMEN CO-OPERATIVE UNION SOCIETY LIMITED…….APPELLANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED……..……..……..1ST RESPONDENT

JOSHUA OGOT……..……..…….2ND RESPONDENT

JAVAN ONYANGO……3RD RESPONDENT

WILLIAM BURUNGO……..……4TH RESPONDENT

RICHARD NGONGO……..……..5TH RESPONDENT

WILLIAM AIRA……..……..6TH RESPONDENT

BONFACE ORANGO……..……..7TH RESPONDENT

RAPHAEL MUGAWE……..……..8TH RESPONDENT

NARIKISHO OKEMBI…….……9TH RESPONDENT

CHARLES NYANGWESO……..…….10TH

RESPONDENT

SHADRACK NABOORI……..……..11TH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ransley, CA, as he then was) dated 19th July 2001 in H. C.C. NO. 2593 of 1996)

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JUDGMENT OF THE COURT

1. The appellant **Muhuru Bay Fishermen Co-operative Union Society Limited** (the Society) is a Cooperative Society registered under section 4 of the Co-operative Societies Act, Cap 490 Laws of Kenya. It sued the respondents in Nairobi HCCC No. 2593 of 1996 vide a plaint dated 18th October 1996 and amended on 3rd February 1998. In summary the averments in the plaint were that the 1st respondent (the Bank) had illegally and unlawfully seized the Society's Motor Vehicle No. KAB 665Z (the lorry) over alleged non-payment of a loan owed to it by the Society. The Society further averred that it had not obtained any loan from the Bank and if any was obtained, it was by the 2nd to the 11th respondents personally. Accordingly it prayed for declarations that it did not owe the Bank any money and that the Bank's chattels mortgage over the lorry was illegal; orders for the discharge of the said chattels mortgage and release of the lorry; general damages for wrongful seizure, detention, waste and depreciation of the lorry; costs; and any further relief the court may deem just to grant.

2. By a defence dated 31st March 1998 the bank denied all the averments in the plaint and contended instead that it had lawfully advanced a loan to the Society; that the loan was duly disbursed to it and properly secured by a chattels mortgage over the lorry; that the Society defaulted in repayment and as a consequence it lawfully seized the lorry. Accordingly the Bank prayed for the dismissal of the claim against it with costs.

3. The other respondents did not file any defence to the claim.

4. Ransley, Commissioner of Assize, (as he then was) heard the suit and in a judgment dated 19th July 2001, dismissed the same. The Society was aggrieved by that decision and filed this appeal contending that the learned Commissioner of Assize had erred by:

> ***1. finding that the appellant was indebted to the 1st respondent in the sum of Kshs. 700,000/=***
>
> ***2. finding that the chattels mortgage over the lorry was valid and legal.***
>
> ***3. refusing to grant an order for the release of the lorry.***
>
> ***4. failing to find the seizure and detention of the lorry was wrongful and failing to award general damages.***

5. For the Society, ***Mr. Chacha Odera***, learned counsel, argued that it applied on 15th October 1993 for an overdraft of Kshs. 500,000/= and working capital of Kshs. 270,000/= from the Bank but in its letter of offer dated 22nd December, 1993 the Bank altered the terms of the application to a loan of Kshs. 500,000/= and overdraft of Kshs. 200,000/=. The purpose of the loan, according to the Bank, was to enable the appellant re-schedule an already existing overdraft into a term loan for a period of 24 months. It was contended that the Commissioner of Co-operatives never sanctioned the said pre-existing overdraft as required by the Act and the rules made thereunder, a fact which was conceded by the Bank's witness, and that the same was illegal and could not be enforced. Counsel also submitted that there was also no evidence that Kshs. 700,000/= was ever disbursed to the Society because all that the Bank did was to

make a debit entry of Kshs. 500,000/= for the unauthorized overdraft. Similarly, it was contended, there was no evidence of disbursement of Kshs. 270,000/= to the society.

6. Regarding the validity of the chattels mortgage, it was submitted that the resolution in support of the creation of the alleged mortgage was dated 9th November, 1994 purporting to be a resolution of the general meeting of the Society held on 18th October 1994; that the resolution was dated in Nairobi instead of South Nyanza where the meeting was allegedly held; that the minute book tendered in evidence did not show that any general meeting was held on 18th October, 1994; that the date stamp on the copy of the purported minutes indicated that they were received by the Bank on 18th October 1993 long before the said resolution was passed; and that the purported resolution of 9th November 1994 authorizing the creation of a chattels mortgage over the lorry was of no effect because the chattels mortgage had already been created way back on 27th July 1994 and a certificate to that effect issued on the 8th August 1994.

7. Regarding the alleged approval of the loan, it was submitted that the purported approval by the Migori District Loans Committee was on the 4th November 1993 long after the Society's application for the loan and the purported approval by the Commissioner on 18th October 1993; that the resolution of the Society authorizing the borrowing of up to Kshs. 10 million was for the financial year of 1991/1992 and not beyond; that Minute No.5/94 of the meeting purportedly held on 24th May 1994 and authorizing the borrowing of up to Kshs. 700,000/= as well as the acknowledgment of the indebtedness to the bank for a similar amount came approximately 3 months after the book entry paying off the contested overdraft of Kshs. 500,000/= had been effected on the 14th February 1994; and that there was no compliance with sections 41and 49 of the Act and section 96 of the Companies Act and rules 41, 44, and 45 of the Co-operative Societies Rules. On the basis of the foregoing, it was submitted that the entire transaction was tainted by illegality and that the Society's lorry ought not to have been seized in satisfaction of a non-existent or illegal indebtedness to the Bank.

8. Learned counsel concluded by submitting that a contract that is illegal is unenforceable, cannot be ratified, and that any money paid under such a contract is not recoverable. Several authorities were cited in support of the proposition, among them ***Boisse Vain v. Weil [1950] 1 ALLER 728***, ***Spector v. Ageda [1971] 3 ALLER 417***, ***Marpis Investments (K) Ltd v. Kenya Railways Corporation [2006] eKLR*** and ***National Bank of Kenya Ltd v. Wilson Ndolo Ayah Nairobi, CA No.119 of 2002 (UR)***.

9. For the Bank, ***Mr. Paul Wanga*** learned counsel urged us to dismiss the appeal on the grounds that the Society's special general meeting held on 14th February 1991 had authorised it to borrow up to about Kshs. 10 million and that the amount borrowed by the Society was within the permitted limit; that the rules did not require the borrowing limit to be set annually but from time to time; and that no competent organ of the Society had varied or annulled the set borrowing limit.

10. Counsel further submitted that the loan was procedurally and lawfully applied for on 15th October 1993, that the same was duly approved by the Migori District Co-operative Officer representing the Commissioner of Co-operatives; that the Society offered the lorry as security; that the Society acknowledged disbursement of Kshs. 700,000/= by the Bank as well as its indebtedness to the Bank for that amount in the minutes of its special general meeting held on 24th May 1994; and that PW1 had confirmed those facts in his evidence. Counsel conceded that the Society had applied for Kshs. 770,000/=, but only Kshs. 700,000/= was approved by the bank and that save for the acknowledgment of debt by the management committee there were no bank statement or any other documentary evidence to prove that Kshs. 700,000/= had been disbursed to the appellant.

11. On the alleged irregularities regarding the loan, **Mr. Wanga** urged that if there were any irregularities, the same were cured by the Society's acknowledgement of indebtedness to the Bank in its minutes of 24th May 1994. Relying on **section 50(1)** of the Act Mr. Wanga submitted that non-compliance with the provisions of the Act did not render the loan un-enforceable. Counsel also invoked **section 53 (2)** of the Act to argue that the certificate issued by the Commissioner was conclusive proof of compliance with the requirements of the Act.

12. Counsel concluded by submitting that the Society's claim for damages was properly dismissed for failure to plead and prove special damages; that claim founded on the tort of detinue was not raised before the trial court; and that in any event the seizure of the lorry was lawful since the Society had defaulted in repaying the loan.

13. In support of the Bank's case, learned counsel relied on ***Jackson K. Kiptoo v. the Hon. Attorney General, CA No. 240 of 2003 (UR)*** and ***Waweru v. Ndiga [1983] KLR 236*** for the propositions that damages for loss of user of a vehicle must not only be pleaded as special damages but also be strictly proved and ***RE CLNye Limited [1970] 3 All ER 106***, to demonstrate validation by the court of a security where the date of registration was misstated.

14. In a brief response learned counsel for the Society submitted that the trial court should have computed the amount claimed by the Society as the daily rate loss and ordered the same to be paid to it.

15. ***Mr. A.G. Opiyo*** learned counsel on record for the other respondents neither filed written submissions nor made any oral representations to court.

16. This is a first appeal. Our mandate is to re-appraise the evidence before us and come to our own independent conclusions but bearing in mind that we do not have the advantage that the trial court had of seeing and hearing the witnesses testify. We shall therefore defer to the findings of the trial court unless we are satisfied that it failed to take account of particular circumstances or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally. (See

Selle & another v. Associated Motor Boat Company Ltd & 2 others [1968] EA 123).

17. From the evidence on record, Minute No. 43 of the meeting of the Society's management committee held on 14th February 1993 refers to a resolution of the general meeting of the year 1991/92 authorizing the Society to borrow. Minute No. 226/93 of the meeting of the committee held on 8th September 1993 resolved to borrow Kshs. 600,000/= from the bank. That decision was superseded by Minute No. 232/93 of 13th October, 1993 which resolved to apply for a loan of Kshs. 770,000/= to be applied towards the repayment of the contested overdraft, while the balance of Kshs. 270,000/= was to constitute working capital. On the basis of that resolution, the authorized signatories of the Society applied to the Migori District Cooperative Officer, in his capacity as the agent of the Commissioner of Cooperatives, for approval of the loan. The application was approved on 4th November 1993 and subsequently forwarded to the Bank. By the letter dated 22nd December 1993 the Bank revised the loan applied for to Kshs.700, 000/=, subject to provision of security for it.

18. It is also apparent from the record that before provision of security for the loan, a debit entry was made on 14th February 1994 for a transfer of an amount of Kshs.500,000/= from the Society's Account No. **002/14/08032/00.** There are no earlier entries to show the basis of that entry. All we have is the testimony of the bank's witness, DW1, that the amount was part of the proceeds of the loan the Society had applied for and the portion of the loan that had been earmarked for offsetting the contested overdraft.

19. By Minute No 5/94 of the Society's management committee meeting held on 24th May 1994 the committee acknowledged the Society's indebtedness to the Bank to the total tune of Kshs.700,000/=. Minute No. 11/94 of the meeting held on the following day, 25th May 1994 approved the resolution taken in minute 5/94 and authorized the Hon. Secretary to formally present an application for the loan. Yet the Society had by then already applied for the loan vide an application dated 15th October 1993, which had been approved by the Migori District Co-operative officer, and by the Bank subject to the reduction already noted.

20. As regards the security, a chattels mortgage instrument was prepared on the 27th July 1994 and registered on 8th August 1994. The security was the Society's lorry. However it was not until 9th November 1994 that a resolution was extracted purporting to be a resolution of the meeting held on 18th

October 1994 and authorizing the appellant to charge its lorry as security for the loan. The relevant minute of 18th October 1994 was not produced in evidence. The charging of the lorry thus came long after the application and approval of the loan. The above are what the appellant contends are irregularities and illegalities which render the transaction null and void. The Bank on the other hand perceives them to be regular and above board transactions.

21. In ***MacFoy v United Africa Co-Limited [1961] 3 ALLER 1169*** at page 1172 ***Lord Denning*** pronounced himself thus on the effect of an act that is a nullity:-

> ***"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more a do. Though it is sometimes convenient to have the court declare it to be so...."*** See also ***National Bank of Kenya Ltd v. Wilson Ndolo Ayah (Supra) and Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others [2014] eKLR***

22. In rejecting the Society's claim, the trial court was satisfied that the Society's power to borrow the loan was properly granted by the general meeting way back in 1991; that the loan had properly been secured against the Society's lorry; that the loan was properly applied for by the authorised officers under the Society's by laws; that it was the duty of the Society and not the Bank to ensure that all the documentation in support of the loan application was in order; and that even if there were irregularities, the Society had suffered no prejudice as it had received the loan from the bank.

23. On the law the learned Commissioner of Assize found due compliance with the provisions of sections 41, 49 and 50 of the Act with regard to the creation of the chattels mortgage over the lorry. He excused the anomaly in the management committees' approval of the chattels mortgage on 18th October 1994 after it had already been created on 27th July 1994. He found too that the existence of the chattels mortgage instrument operated as an estoppel against the Society's attempt to avoid liability for its indebtedness to the bank. Lastly, and on the authority of ***Coohematic Kenya Limited v. Alegenee Bank Nederland, Misc. Civil Case No. 294 of 1979 (UR***) the trial court found that the Company's Act did not apply to the dispute because the Society was not registered under the Company's Act.

While the committee had power to approve loans as found by the Commissioner, the power had to be specifically delegated by the general meeting to the committee under regulation 22(1), 26 and 29 and bylaw 29. There is no evidence of such delegation.

As for the actual loan applied for, it is not disputed that the committee applied for an overdraft of Kshs. 500,000/= and working capital of Kshs. 270,000, which is what the authorized agents of the Commissioner for Cooperatives approved. The Bank of its own motion varied the application and granted a loan of Kshs. 500,000 and an overdraft of 200,000. Even if it is taken that the loan was properly authorised, there is no evidence on record that the overdraft, which it was allegedly applied, to repay had been approved as required by bylaw 29. We therefore agree with the Society that the variations of the loan application by the Bank and in particular the granting of a loan to pay off the contested overdraft was a fundamental variation.

26. Considering the provisions of the Co-operative Societies Act, the regulations and rules made thereunder and the Society's bylaws mentioned we find that the learned Commissioner of Assize erred by holding that the Bank has no obligation to satisfy itself that the application was in compliance with the law. Both transacting parties were obligated to ensure that the provisions of the law were complied with and duly observed.

27. We too do not agree, with respect, with the learned Commissioner of Assize that the Society suffered no prejudice as a result of any irregularities in the dealings between the management committee and the Bank. The Society ended up being saddled with a liability in respect of which there is no evidence of any disbursed sums to it, save for book entries and alleged acknowledgement by the same people who were parties to the irregular borrowing.

28. With regard to the creation of the chattels mortgage, we agree with the Society that its creation was consistent with a belated desperate attempt to regularize what was plainly irregular. That accounts for its registration long after the purported disbursement of the proceeds of the loan. While we agree that section 96 of the Company's Act has no application in this case, on the particular facts of this appeal we are not satisfied that sections 41, 49 and 50 of the Act could be invoked to protect the Bank.

29. On the issue of damages, we agree with the approach taken by the learned Commissioner that the Society was obliged to quantify, plead and strictly prove its claim for damages as special damages. It was not for the trial court or this Court to compute the award claimed by the Society as we were invited to do.

30. With regard to the liability of the other respondents, they did not contest the Society's claim. The irregularities that we have adverted to were their handiwork and they must bear responsibility for any loss or damage suffered by the society arising from their unauthorized or irregular actions.

31. The upshot of the foregoing is that we find merit in this appeal. We allow it partially by setting aside the learned Commissioner of Assize's judgment of 19th July 2001 and allow the appellants claim in terms of prayers (a) (b) and (c) of the amended plaint. We affirm the learned Commissioner of Assize's judgment in disallowing prayer (d) of the said claim. As for costs, since the appellant has substantially succeeded in its claim it will have costs against the Bank both in the High Court and in this Court. It is so ordered.

Dated and Delivered at Nairobi this 20th day of November,2015

R.N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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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