



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & AZANGALALA, J.J.A)

CIVIL APPEAL NO. 91 OF 2012

BETWEEN

GEORGE W. OMONDI.....APPELLANT

AND

GUILDERS INTERNATIONAL BANK LIMITED.....RESPONDENT

(An appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Hon. Mr. Justice Luka Kimaru) dated 29th October, 2010

in

H.C.C.C. NO. 1217 OF 2002

JUDGMENT OF THE COURT

Sometime in 1997, **Guilders International Bank Limited**, the respondent herein, extended financial accommodation to **George W. Omondi**, the appellant herein, and as security for the financial accommodation the appellant charged to the respondent **L.R No. 3734/311** (hereinafter “the Lavington property”). The appellant defaulted in the repayment of the said financial facility and by 10th November, 1997 he owed the respondent in excess of Kshs.10 million inclusive of interest. The default triggered the process of realization by the appellant of its security.

Upon commencement of the said process the parties entered into negotiations with a view to resolving their dispute which negotiations ended with the appellant delivering to the respondent’s advocates, **M/s P.L. Mutuli & Co.**, title documents of **L.R No. 209/4401/171/307** (hereinafter “the Makadara property”). A charge was then registered in favour of the respondent in February, 1998.

The parties did not agree on the reason why the appellant offered the Makadara property to be charged in favour of the respondent. According to the appellant, the Makadara property was intended to replace the Lavington property as security for the sums owed to the respondent but according to the latter the Makadara property was given, at its request, as additional security for the same sums.

The record reveals that the parties further engaged in other arrangements geared towards resolving their dispute. One such arrangement involved motor vehicle registration number KAL 776S – a Toyota Prado, which the appellant offered to the respondent to sell and apply the proceeds thereof towards reduction of his indebtedness with the respondent. In the end and after conclusion of other proceedings which included other parties not joined in these proceedings, a sum of Kshs.2 million was appropriated towards reducing the appellant's indebtedness with the respondent.

The appellant further claimed that the respondent permitted him to sell the Lavington property by private treaty and use the proceeds thereof to settle his indebtedness with the respondent but had reneged on the proposal and even refused to discharge the charge over the same notwithstanding that it had charged his Makadara property to secure the same sums.

The parties' engagement in non-litigious arrangements to resolve their dispute appears to have reached a dead end and the respondent advertised the Makadara property for sale by public auction to recover sums owed to it by the appellant. The reaction of the appellant to the respondent's decision to enforce its security was the filing of High Court Civil Case No. 1217 of 2002. In that suit the appellant, in his amended plaint, principally sought a permanent injunction restraining the respondent from disposing of both the Makadara and the Lavington properties; return of title documents for the Lavington property; damages and a declaration that he was to pay to the respondent only the sum borrowed less the sum already received by the respondent.

The foundation of the appellant's principal claim was pleaded in paragraphs 6, 7, 8, 11, 12, 13 and 14 of the said amended plaint. The salient averments were that whereas the respondent had agreed to discharge the Lavington property and let the appellant dispose of the same to settle his indebtedness with the respondent, and whereas the appellant had, pursuant to that agreement, delivered title documents of the Makadara property to the respondent who had charged the title to itself, the respondent had, in breach of the agreement, refused to discharge the Lavington property and release to the appellant documents of title thereof. The respondent had, so the appellant claimed, frustrated the sale of the Lavington property by private treaty and had instead advertised for sale the Makadara property without prior service of a statutory notice. In those premises, the appellant claimed that the intended sale was ***“unlawful, premature, negligent, oppressive and calculated to cause injustice; injury, loss and irreparable damage”*** to the appellant. The appellant further alleged that the intended sale was ***“ill motivated and calculated to obtain the occasion for sale of the two properties.”***

The claim was heard by **Kimaru J**, on 21st and 27th July, 2009 when the learned Judge took the evidence of the appellant (PW 1) and one, **Daniel Gaturu Karonji** (DW 1) who testified for the respondent. The parties then delivered lengthy submissions in writing and the learned Judge delivered his judgment on 29th October, 2010. The learned Judge entered judgment as follows:-

“(i) The defendant is hereby ordered to forthwith release to the plaintiff the duly discharged title in respect of the Lavington property i.e. LR No. 3437/311 – Lavington.

(ii) The defendant is permanently restrained by means of a permanent injunction from interfering with the plaintiff's ownership and occupation of the Lavington property.

(iii) The defendant shall [be] at liberty to exercise its statutory power of sale to sell the Makadara property i.e LR No. 209/4401/307 (if the plaintiff shall not repay the debt) to recover the amount owed by the plaintiff pursuant to the loan that was advanced to the plaintiff.

(iv) The plaintiff shall pay to the defendant the amount he owes to the defendant which stood at Kshs.36,137,388.05 as at 10th February, 2002. This amount shall be paid together with the prevailing rate of interest of 18% per annum from that date until payment in full.

(v) The plaintiff shall be paid 2/5th of the costs of this suit.”

The appellant was aggrieved by that judgment and has come before this court by way of an appeal. His memorandum of appeal lodged in this court on 2nd May, 2012 contained a total of eleven (11) grounds of appeal. However, at the commencement of the hearing **Mr. Issa**, learned counsel for the appellant, condensed those grounds into 4 broad grounds by arguing grounds 1, 2, 3, 4, 5 and 6 together; grounds 7 and 8 together; grounds 9 and 10 together and ground 11 separately.

Under the 1st cluster of grounds, **Mr. Issa** submitted that it was not open to the learned Judge to make any award in favour of the respondent in the absence of pleadings, particularly a counter claim, on the record. Learned counsel expressed the view that absent a counter-claim, the sum of Kshs.36,137,388.05 plus interest could not have been awarded to the respondent. Learned counsel submitted that the matter was compounded by the fact that money owed was not even framed as an issue by the parties.

With respect to the second cluster of the grounds of appeal, learned counsel contended that the exercise of statutory power of sale by the respondent was not analysed by the learned Judge in his judgment and consequently the order with regard to the respondent's exercise of its statutory power of sale could not be made. Counsel further submitted that the issue was also not even framed by the learned Judge himself.

The 3rd cluster of grounds related to the respondent's capacity to exercise a statutory power of sale when it was acknowledged that it had ceased to operate as a bank.

The last ground related to costs. Learned counsel expressed the view that the appellant was entitled to full costs of the suit given the findings of the learned Judge.

Reliance was placed upon several authorities to buttress counsel's arguments on all the above issues which were argued before us.

Mr. Murugara, Learned counsel for the respondent, commenced his response to the submissions made on behalf of the appellant by stating that costs of proceedings before the court are at the discretion of the court and that the learned Judge of the court below had properly exercised his discretion when he declined to award full costs to the appellant. With regard to the *locus standi* of the respondent, learned counsel contended that the same could not be challenged in view of the provisions of the Companies Act and the Banking Act.

On the challenge made with regard to the findings of the learned Judge on the right of the respondent to exercise its statutory power of sale under the charge, learned counsel was of the view that the validity of Statutory Notice served upon the appellant was not challenged. It was his further view that a valid statutory Notice of Sale would have to be served before a fresh exercise of the statutory power of sale. Indeed, according to learned counsel, there is another pending suit in which the statutory notice is an issue for determination.

With regard to the complaint that awards were made in favour of the respondent without a counter-claim having been raised, learned counsel contended that no judgment was entered in favour of the respondent but a declaration of sums owed was made pursuant to a prayer sought by the appellant in his amended plaint. Counsel further submitted that interest and other issues were raised by the appellant himself and he should not now complain when orders were made in consonance with those issues. In the end **Mr. Murugara** urged us to dismiss the appeal with costs.

As a first appellate Court, it is our duty to reconsider the entire evidence, evaluate it ourselves and draw our own conclusions in deciding whether or not we should support the trial Judge's conclusions. (See **Selle - v- Associated Motor Boat Co. [1968] EA 123** and **Abdul Hameed Saif -v-Ali Mohamed Sholan [1955] 22E.A.C.A. 270**, among many others). With regard to the 1st broad issue argued by the appellant, there is no gainsaying that indeed the respondent did not raise a counter-claim when it responded to the appellant's claim. There could therefore be no judgment in favour of the respondent which it could execute against the appellant. There is no shortage of authority on this issue. In the case of **Captain Harry Gandy -v- Caspar Air Charters Limited [1956] 23 E.A.C.A. 139**, the predecessor of this Court, in an appeal from the trial court which gave judgment against the appellant on a counter claim

on a ground which was never pleaded, the Court held:

“The trial Judge erred in reaching a decision based on a ground which was not pleaded but as both parties indicated that they did not desire a new trial but wished the court of appeal finally to determine the litigation, the court made its own findings on the issues of fact concerned.”

Sinclair, the Vice – President of the Court, rendered himself as follows:-

“The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”

The principle in **Gandy -v- Casper Air Charters Limited** has been applied by our courts since. The case of **General Accident Insurance Co. Ltd. –v- Mutuma [1995-1998] 1 EA 65** is one such case. There, an accident victim had claimed against the motor vehicle owner, damages for injuries he had sustained while traveling on the latter’s pickup vehicle. The victim claimed as a passenger which risk was not covered by the insurance policy issued in respect of the motor vehicle. The motor vehicle owner failed to satisfy the judgment given in favour of the accident victim. The latter therefore sought to recover the judgment sum against the appellant as the insurance company which covered the risk. The trial court passed judgment against the insurance company on the ground that the risk was covered by the latter as the accident victim was an employee of the motor vehicle owner which relationship was not pleaded in the suit for damages against the motor vehicle owner. On appeal, this court held:

“The trial Judge erred in deciding the case on unpleaded issue. The Respondent’s case as pleaded in the court below was that he was a passenger simpliciter. There was no pleading or evidence to support the trial Judge’s finding that he was travelling on the pick-up as a passenger by reason of or in pursuance of a contract of employment.”

As a general rule therefore, it is not open to a court to base its decision on an unpleaded issue. There are however, acknowledged exceptions to this general rule. We identified such an exception in the case of **Odd Jobs -v- Mubia [1970] EA 476** namely, where it appears from the course followed at the trial that the unpleaded issue has been left to the court for decision. In this case only the appellant testified in support of his case and only **Daniel Gaturu Karonji (DW 1)** testified for the respondent. On the sum he owed to the respondent, the appellant did not specify the same in his testimony but asked the court to permit him *“pay the amount borrowed less the amount paid”*. He further stated that he had admitted owing the respondent Kshs.7.4 million and added that they had an agreement to cap his liability at Kshs.10 million. On the sum of Kshs.36,137,388.05 decreed to be paid to the respondent the appellant stated, in cross examination, that that amount was allegedly owed as at 10th December, 2002 but he could not accept that figure as, according to him, he still owed only Kshs.7.4 million. Nowhere in his testimony did the appellant mention any rate of interest let alone the 18% per annum the learned Judge decreed.

On his part, Daniel Gaturu Karonji (DW 1) denied that the respondent agreed to cap the appellant’s indebtedness at Kshs.10 million. He stated, in examination in chief, that the appellant was indebted to the bank without specifying the sum owed. It is only in cross-examination that he testified that as at December, 2002, the appellant owed the respondent Kshs.36,137,388.05. He urged that the respondent be allowed to sell the two properties charged to it. DW 1 did not pray for an order for payment of Kshs.36,137,388.05 or any other sum nor did he mention a prevailing rate of interest or indeed any interest in his entire evidence.

Given the testimony of the only two witnesses who testified before the learned Judge, we find no evidence that the parties left to the court for decision the issue of payment of the sum of Kshs.36,137,338.05 and the 18% p.a. interest ordered by the learned Judge. The appellant at paragraph (G) of his prayers in the amended plaint, sought a declaration that he pays to the respondent only the sum borrowed less the sum already paid. We do not, with all due respect to the learned Judge, think that that prayer alone could be the foundation for the decree to pay the sum of Kshs.36,137,388.05. In any event,

according to the appellant, the sum he admitted owing was Kshs.7.4 million which, in his view, was sufficiently secured. The appellant would also suffer double jeopardy if he was to pay the said sum as ordered and have his property auctioned by the respondent in exercise of its statutory power of sale which the learned Judge also permitted. The first cluster of grounds argued before us therefore succeeds.

The 2nd cluster of grounds of appeal deal with the respondent's exercise of its statutory power of sale. The record shows that the learned Judge framed four issues for determination in his judgment. It is plain that the learned Judge did not frame, as an issue, the exercise of statutory power of sale by respondent. The validity of statutory notices served by the respondent upon the appellant did not appear to the parties to be in contention to have elicited analysis by the learned Judge although the appellant had in his pleadings denied being served with a statutory notice of sale and the respondent had claimed to have served the same.

In our view, despite the failure of the learned Judge to frame the exercise of the statutory power of sale by the respondent as an issue, paragraph (A) of the appellant's amended plaint expressly sought a permanent injunction restraining the respondent from selling, or otherwise disposing of both the Lavington and Makadara properties. It was, in the circumstances, open to the learned Judge to make a finding granting or declining the permanent injunction. By his order giving liberty to the respondent to exercise its statutory power of sale to sell the Makadara property, the learned Judge in effect declined to grant the permanent injunction sought by the appellant in respect of the Makadara property.

Given the unequivocal admission of the appellant that he was indebted to the respondent in certain sums, the learned Judge cannot be faulted for granting liberty to the respondent to exercise its statutory power of sale to sell the Makadara property. The 2nd cluster of issues argued by the appellant therefore fails and we reject the same. We only add for purposes of clarity that in exercising its statutory power of sale in the event the default persists, the respondent will comply with the law including service of a valid statutory notice of sale.

On the issue of whether the respondent had the *locus standi* to proceed in its former name, our brief answer is that nothing should turn on the same as the appellant cannot avoid liability on the basis of the style under which the respondent was brought to court. After all, it is the appellant who raised specific complaints against the respondent. He cannot approbate and reprobate at the same time. In any event the appellant never suggested that another entity was making any claim against him. We also think that to accede to the appellant's argument would offend Article 159 (2)(d) of the Constitution which codifies the general principle that substance should take precedence over form. The 2nd cluster of grounds argued by the appellant fails and is rejected.

On the issue of whether the appellant should have been awarded full costs, the simple answer is that costs are at the discretion of the Court. The appellant did not get all he prayed for. He was not awarded an injunction with respect to the Makadara property. He was also not awarded damages which he had sought in his amended plaint. Neither was the declaration he prayed for granted. In the premises, the last ground of appeal must fail as, in our view, the learned Judge was not guilty of improper exercise of discretion when he awarded the appellant 2/5th of the costs of the suit.

The net effect of all these is therefore that the appeal succeeds in part. The order of the learned Judge ordering the appellant to pay to the respondent Kshs.36,137,388.05 plus interest at 18% per annum is hereby set aside. The respondent is at liberty to exercise its statutory power of sale with respect to the Makadara property subject to compliance with the law including the service of a valid statutory notice. The other orders made by the learned Judge are confirmed.

The appellant has partly succeeded and we award him ½ the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 13th DAY OF NOVEMBER 2015.

W. KARANJA

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR