IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 3 OF 2013

BETWEEN

SAMSON MBUI OBADIAH …..... APPELLANT

AND

DAVID MITHAMO GATITU …..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Ong'undi, J.)

dated 20th December, 2012

in

H.C.C.A NO. 61 OF 2011)

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JUDGMENT OF THE COURT

1. Before us is an appeal from the judgment of the High Court (Ong'undi, J.) dated 20th December, 2012. At the hearing of this appeal, the respondent made an application under ***Rule 104 (b)*** of the ***Court of Appeal Rules*** (the Rules) seeking an order striking out the appeal for being incompetent as drawn. This Court directed for both the application and the appeal to be argued together. Therefore this judgment is in respect of both the respondent's application and the appeal.
2. The genesis of the appeal herein is that appellant vide an amended Plaint filed in the Senior Resident Magistrate's Court at Kerugoya sought a refund of Kshs. 314,000/= from the respondent as per an undertaking dated 12th August, 2004. It was the appellant's case that on 5th June, 2004 he lent Kshs. 320,000/= to the respondent with the understanding that he would refund the same and an agreement (loan agreement) to that effect was executed by the parties. Thereafter, on 12th August, 2004 the respondent informed the appellant that he wished to pay part of the loan amount. The parties agreed to approach an advocate who would draw up an acknowledgement and undertaking agreement since the appellant had misplaced the loan agreement.
3. The parties approached Ndana advocate who prepared an acknowledgement and undertaking agreement (undertaking agreement) dated 12th August, 2004. The terms of the of the undertaking agreement were that the respondent acknowledged that he owed the appellant the sum of Kshs. 320,000/=; that upon execution of the agreement the respondent would pay Kshs. 6,000/= to the appellant; on or before 31st December, 2004 the respondent would pay Kshs. 40,000/- and the

balance of Kshs. 274,000/= would be paid on or before 31st July, 2006. The appellant averred that the respondent did pay Kshs.6,000/= upon execution of the said agreement but defaulted to honour the other terms despite several demand notices. Consequently, the appellant filed suit claiming balance of Kshs. 314,000/=.

4. The respondent filed a Statement of Defence denying the allegations made by the appellant. He contended that he never executed the undertaking agreement dated 12th August, 2004 and that the signature thereon was a forgery. It was the respondent's case that the appellant's suit was a fabrication.
5. During the trial, the appellant reiterated the averments in his Plaint. PW2, Joseph Gachoki Kago (Joseph), testified that he witnessed both the appellant and the respondent execute the undertaking agreement that was prepared by Ndana advocate. On the other hand, the respondent testified that the suit was a fabrication owing to a grudge the appellant had against his family. He stated that in the year 2004 he had a disagreement with his wife who left and went to live with the appellant. Thereafter, his wife returned and she was arrested and charged with stealing Kshs. 320,000/= from the appellant. The suit was later dismissed. It is on account of the dismissal of the suit against his wife that the respondent believes the appellant filed the suit against him.
6. Being satisfied that the appellant had proved his case, the trial Magistrate entered judgment in favour of the appellant. Aggrieved with the said decision, the respondent filed an appeal in the High Court. The High Court (Ong'undi, J.) in a judgment dated 20th December, 2012 allowed the appeal and set aside the judgment of the trial Magistrate and issued orders dismissing the appellant's suit with costs. It is that decision that has instigated this second appeal based on the following grounds:-

- ***The learned Judge erred in law and in fact in holding that what was delivered by the trial magistrate fell short of what would be referred to as a judgment.***

- ***The learned Judge erred in law and in fact when she held that the trial magistrate did not comment on the evidence and did not raise any issues. The respondent in his written statement of Defence only raised the issue of forgery and the trial magistrate in his judgment did comment that the alleged fraud was not proven.***

- ***The learned Judge erred in law and in fact when she analysed the evidence and stated that besides the appellants word there was no other evidence to confirm that he ever gave Kshs. 320,000/= to the respondent.***

- ***The learned Judge erred in law and in fact when she relied on Section 19 of the Stamp Duty Act, Chapter 480, Laws of Kenya by holding that unstamped documents were not admissible. She failed to consider that the document in this matter was an acknowledgement which did not require to have been stamped.***

7. Mr. Mwai, learned counsel for the appellant, submitted that ***Rule 84*** of the Rules, requires an application to strike out an appeal to be made within 30 days from the date of service of the Notice of Appeal or Record of Appeal. The respondent having failed to make such an application within the requisite period could not make such an application at this point. In support of the appeal, Mr. Mwai argued that the trial court's findings were correct and complied with the law. He urged us to allow the appeal.
8. Mr. Gacheru, learned counsel for the respondent, in support of his application to strike out the appeal, submitted that the Notice of Appeal on record indicated it was drawn on 11th January, 2013 and lodged in court on 21st December, 2012; as drawn, the Notice of Appeal was incompetent. In opposing the appeal, Mr. Gacheru argued that the trial court's judgment was faulty because he gave no reasons for his decision. He argued that the trial court's bias towards the respondent was evident in the proceedings. This is because the respondent had objected to the production of the undertaking agreement on the grounds that stamp duty had not been paid. However, the trial magistrate overruled the objection even without giving the appellant's counsel an opportunity to respond to the objection. He urged us to dismiss the appeal.

9. Mr. Mwai, in response to the aforementioned submissions, argued that the stamp duty in respect of undertaking agreement was paid and evidence of the same was on record. He maintained that Ndana advocate was not called to produce the undertaking agreement because the agreement had not been objected to.
10. We have considered the Record, the grounds of appeal, submissions by counsel and the law. At this juncture we are of the view that it is appropriate to first consider the application for striking out the appeal. ***Rule 104 (b)*** of the Rules provides,

"A respondent shall not, without leave of the Court, raise any objection to the competence of the appeal which might have been raised by the application under Rule 84"

Rule 84 provides,

"A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the Notice of Appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. Provided that an application to strike out a Notice of Appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the Notice of Appeal or Record of Appeal as the case may" be."

Rule 84 requires a respondent to make an application to strike out a Notice of Appeal within 30 days of service of the same. In this case the respondent did not give any explanation as to why he did not make the said application within the requisite time frame. We are of the view that the reason why ***Rule 104 (b)*** requires a respondent to obtain leave of the Court before making an application for striking out an appeal at the hearing of the appeal is to ensure that the Court's process is not abused. It is therefore imperative for a respondent to satisfy the Court that it was reasonably unable to make such an application under ***Rule 84***. We are of the view that the respondent did not demonstrate why he was unable to make the application within the requisite period under ***Rule 84.*** We therefore, decline to allow the respondent's application.

11. We appreciate that this is a second appeal and therefore we are confined to deal with matters of law unless it is established that the two lower courts considered matters they should not have or failed to consider matters they should have. In ***Kenya Breweries Limited -vs- Godfrey Odoyo- Civil Appeal No. 127 of 2007,*** Onyango -Otieno, J.A expressed himself as follows:-

"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is preserve."

12. ***Order 21 rule 4*** of the ***Civil Procedure Rules*** provides that a judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such a decision. See this Court's decisions in ***Municipal Council of Kitale -vs- Fedha- Civil Appeal No. 7 of 1983 & Wamutu -vs- Kiarie- Civil Appeal No. 64 of 1981.*** Having perused the trial court's judgement we concur with the following findings by the learned Judge,

"I entirely agree with Mr. Gacheru for the appellant that what was delivered by the learned trial magistrate fell short of what one would refer to as judgment. All that the learned trial magistrate did was to summarize the evidence and in three sentences stated;

"This is pretty much an open and shut case, the plaintiff has on a balance of probabilities proven his claim and I hereby enter judgment for the plaintiff against the defendant as prayed."

He did not comment on the evidence, he never raised any issues."

13. The next issue that falls for our consideration is whether the appellant proved his case to the required standard. In ***Bonham Carter vs. Hyde Park Hotel Ltd (1948) 64 T. R. 77,*** it was stated:

"The plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, this is what I have lost, I ask you to give me these damages. They have to provide it. (See Ouma vs. Nairobi City Council (1976) KLR 297, 304)."

We are of the considered view that the appellant did not prove his case on a balance of probabilities. This is because firstly, the appellant testified that after lending the respondent Kshs. 320,000/= they executed an agreement in the presence of witness and made five copies of the said agreement. None of the witnesses who allegedly witnessed the execution of the loan agreement were called by the appellant. The appellant also failed to produce the loan agreement. This was important because the respondent denied that the appellant lent him any money. Secondly, the appellant maintained that the undertaking agreement was executed by the respondent in the presence of Ndana advocate and PW2, Joseph. On the other hand, the respondent denied executing the agreement and claimed the signature thereon was a forgery. It was imperative for additional corroborative evidence to be adduced by the appellant by calling the advocate who prepared and witnessed the execution of the agreement. Thirdly, the appellant's evidence contradicted the evidence tendered by his witness, Joseph, who claimed to have been present when the respondent executed the undertaking agreement. The appellant testified that after the respondent paid Kshs. 6,000/= he was not issued with a receipt while Joseph testified that the respondent was given a receipt in acknowledgement of the said payment by the advocate. This contradiction calls into question the credibility of the appellant and Joseph. We find that the learned Judge correctly re-evaluated the evidence that was tendered in the trial court. See this Court's decision in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123.***

14. Having found as above we see no reason to consider the other grounds of appeal. The upshot of the foregoing is that we find that the appeal has no merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 5th day of February, 2014.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

MARTHA KOOME

….....

JUDGE OF APPEAL

J. OTIENO-ODEK

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR