



IN THE COURT OF APPEAL

AT MOMB ASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A.)

CIVIL APPEAL NO. 33 OF 2012

BETWEEN

1. IBRAHIM MUSA MOHAMED

2. IBRAHIM MUSA & SONS LIMITED.....APPELLANTS

AND

GUARDIAN BANK LIMITEDRESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Kasango, J.) dated 21st July, 2012

in

H.C. Commercial Suit No. 8 of 2006)

JUDGMENT OF THE COURT

This appeal arises from the judgment of *Kasango, J.* delivered on 21st July, 2012.

Briefly the facts of the case are that the appellants herein filed suit vide a plaint dated 7th November, 2005 against Guardian Bank Ltd, the respondent herein. The gist of the appellant's case is contained in paragraphs 5, 6, 7 and 8 of the plaint, to wit,

5. *“That sometimes in 1997 the Plaintiffs being the account holder of First National Finance Bank negotiated for an overdraft of Kshs.5,000,000/- granted by a charge on the Plaintiff's property being No. Mombasa/Block XVIII /486 and the Plaintiffs endeavoured to service the loan and have to-date paid Kshs.6,000,000/= through daily banking.”*

6. *“The Plaintiffs claim that the Defendant took over the operations of the First National Finance Bank Limited vide Kenya Gazette Notice Number one (1) of 8th January, 1999 without any requisite Notice to the Plaintiffs. The take-over resulted to the Plaintiffs being unable to redeem their property resulting its sale at undervalue resulting in loss of Kshs.10,500,000/-”*

7th*“The Plaintiffs further claim against the defendant is that the property, MOMBASA/BLOCK*

/XVXXX/486 valued by the bank was Kshs.30,000,000/- but the Defendant forced the Plaintiffs to sell the same Plot at a loss”.

8“The Plaintiffs avers that the Defendant took Kshs.5,350,000/- from the Defendant(sic) fraudulently purporting that the Defendant first National Finance Bank Limited, when the Defendant the said Bank (First National Finance Bank Limited)(sic) does not exist as from January, 1999 as Kenya Gazette Notice aforesaid.”

The appellant made the following prayers, inter alia:-

“(a) Refund of the Plaintiffs’ money obtained fraudulently.

(b) General damages for loss as the Plaintiffs’ plot MOMBASA/BLOCK XVIII/486 was sold (sic) undervalue.”

The respondent filed a statement of defence dated 15th February, 2006. The crux of the respondent’s defence was that the 2nd appellant obtained a loan from First National Financial Bank Limited (**FNFBL**) and the security provided was property known as **Plot No. Mombasa/Block XVIII/2486** owned by the 1st appellant. The respondent further averred that the appellants defaulted in servicing the loan. Subsequently, the plaint was amended on 28th September, 2006 to include allegations of fraud and false pretenses as against the respondent. The particulars of fraud and false pretenses were:

- a. Writing a demand letter to the Plaintiff pretending to be First National Finance Bank.*
- b. Instructing Datoos Auctioneers to auction the Plaintiff’s property pretending to be First National Finance Bank Ltd.*
- c. Instructing A.B. Patel & Patel advocates pretending to be First National Finance Bank Ltd.*
- d. Negotiating to reduce the amount earlier demanded pretending to be First National Finance Bank Ltd.*
- e. Receiving Kshs.8,350,000/- from Sachdeva & Co., Advocates (on behalf of the Plaintiff) pretending to be First National Finance Bank Ltd.*
- f. Preparing a discharge of charge, pretending to be First National Finance Bank Ltd.*
- g. Instructing Valuers to value the Plaintiffs property and yet the Plaintiffs had no account with them.*
- h. Objecting to be joined as a party in HCCC 187 of 2000 where all these issues could have been canvassed and thus leaving the plaintiff to have a case with a non-existent entity.*
- 10.The Defendant pretended to be First National Bank Ltd by using their letterheads to intimidate, threaten, pressurize and even though the same false pretense, instructed Datoos Auctioneers to auction the Plaintiffs property, thereby forcing the Plaintiff to file a suit against First National Finance Bank Ltd, which by that time , was not existing as a bank.*
- 12.The Plaintiff avers that as a result of that fraud/false pretence the Plaintiffs were pressurized to agree to have the property to be sold at Kshs.19,500,000/- instead of Kshs.30,000,000/- being the market value to mitigate their losses and claims kshs.10.500,000/- being the difference the market price and the forced sale.”*

The matter proceeded to hearing at the High Court and on 26th July, 2012 *Kasango, J.* dismissed the appellants’ case. This precipitated this appeal. In the appeal the appellant listed no less than 9 grounds of

appeal. These were:-

1. ***“THAT the learned trial judge erred in law and in fact in dismissing the Appellants’ entire suit in spite of weighty and overwhelming evidence placed before her by way of oral and documentary evidence.***
2. ***THAT the learned trial judge erred in law and in fact in dismissing the appellants’ suit based on single defence witness whose evidence was weak and shallow and contradictory with little or no probative value.***
3. ***THAT the learned Judge erred in law in basing her judgment almost entirely on a document marked “without Prejudice” thereby disregarding the principals applicable and the probative value to be attached to such a document.***
4. ***THAT the learned trial Judge erred in law and in fact in making a finding that the 1st Appellant voluntarily sold his property without any or sufficient evidence to support such a finding.***
5. ***THAT the learned trial Judge erred in law and in fact in making a finding that the Appellants had not proved fraud even when there was sufficient evidence to support fraud by the conduct word and deed of the respondent.***
6. ***THAT the learned Judge erred in law and in fact in proceeding to announce judgment based on irrelevant issues and considerations thereby misdirecting herself and arriving at a wrong decision.***
7. ***THAT the learned trial Judge erred in law and in fact in dismissing the Appellants’ suit even on the face of clear evidence that it was the Respondent herein and not First National Finance Bank which unlawfully and illegally sold the 1st appellant property even after the Respondent admitting that the 2nd Appellants account was not to be taken over by the Respondent.***
8. ***THAT the learned trial Judge erred in law and in fact in making a finding that the Appellants had failed to prove special damages which damages were clearly pleaded and proved.***
9. ***THAT the learned trial Judge erred in fact and in law in dismissing the 1st Appellants allegation that he was under undue pressure and was coerced by the Respondent’s top management to let go his property without any legal justification whatsoever.”***

During the hearing of the appeal before us, **Mr. Mburu Kariuki** the learned counsel for the appellant urged us to find that the 2nd appellant **Ibrahim Musa & Sons Limited** acquired some credit facility from **FNFB** and that the 1st Appellant **Ibrahim Musa Mohamed** provided a security by way of charge of his property, **Plot No. Mombasa/Block XVIII/2486**. He contended that the respondent had no basis in selling the 1st appellant’s property in view of the take-over of First National Finance Bank by the respondent as the 2nd Appellants account was excluded from those taken over by the respondent. His further submission was that undue pressure was put to bear on the 1st appellant that resulted in him selling his property at an undervalue. He faulted the High Court for its consideration of letters written by the appellant albeit on a “*without prejudice basis*”. The appellant urged us to find that the respondent had acted fraudulently.

Mr. Khagram for the respondent vehemently opposed the appeal. He submitted that contrary to the appellant’s contention, the respondent did not sell the 1st appellant’s property but the 1st appellant sold his property and paid off the sum owed. He refuted the allegations of fraud made against the respondent. He submitted that the law permitted a consideration of letters written on a “*without prejudice basis*” as long as the letters exchanged resulted in an agreement.

The above is a summary of the rival contestations. We have carefully considered the submissions of the learned counsel for each party, the facts of the case as well as the authorities cited.

The 1st Appellant's contention of fraud was based on the fact that it was the respondent and not FNFBL who received the proceeds of the sale of the 1st appellant's property known as Plot No. MOMBASA/BLOCK/XVIII/2486. The 1st appellant contended that the respondent received these proceeds under the guise that it was FNFBL. Further, that although the respondent had taken over FNFBL Ltd, the appellant's account had been specifically excluded from those taken over by the respondent.

The other complaint raised by the 1st appellant was that he did not voluntarily dispose of his property so as to off-set the sum owed to FNFBL as undue pressure was put to bear on him and this resulted in him disposing of his property at an under-value.

It is not disputed that the 1st appellant was the owner of property known as Plot No. Mombasa/Block/XVIII/2486. It is also common ground that the 2nd appellant was granted an overdraft of Kshs.5 million by FNFBL on the strength of the security belonging to the 1st appellant. It is also apparent that the 2nd appellant did not service the overdraft as expected and to fore-stall precipitate action by the FNFBL, the 1st appellant filed *H.C.C.C. No. 187 of 2001 (Ibrahim Musa & Ibrahim Musa & sons Ltd vs. First National Finance Bank Limited & Another)* seeking an injunctive relief to prevent FNFBL from exercising its statutory power of sale. This suit was subsequently compromised by the recording of a consent. The terms of the consent were that the 1st appellant was to pay the sum of Kshs.8,350,000/- in full and final settlement of the sum owed to the bank. It is therefore incorrect for the 1st appellant to argue that he did not voluntarily sell plot No. Mombasa/Block/XVIII/2486. We find that he voluntarily sold his property so as to offset the debt.

On the issue that the 1st respondent fraudulently received the sum of Kshs.8.million from the 1st appellant, and yet FNFBL whom the appellant borrowed money from had ceased to exist from January, 1999, we find that the take-over of FNFBL by the respondent was undertaken vide an agreement dated 27th March, 1999 and in conformity with commercial practices. The take-over was advertised in the Kenya Gazette of 18th August, 1999. The Notice in the Kenya Gazette read as follows:-

“THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES & PRICE CONTROL ACT (CAP.504).

Acquisition of the First National Finance Bank Limited P.O Box 57681, Nairobi by the Guardian Bank Limited of P.O Box 46983, NAIROBI

IN EXERCISE of the powers conferred by section 31 (3) of the Restrictive Trade Practices, Monopolies and Price Control Act, the Minister for Finance authorizes the acquisition of the First National Finance Bank Limited by the Guardian Bank Limited

Dated the 5th January, 1999.

SIMON NYACHAE

Minister for Finance”

Indeed this take-over is acknowledged in a letter dated 2nd March, 2004 by Sachdeva & Company Advocates acting for the 1st appellant to Messrs' Omwitsa Wasuna Kadima Advocates who were acting for the appellants in Mombasa ***HCCC Number 187 /2001***. It states:-

“We act for Mr. Ibrahim Musa Mohamed in connection with the sale of his property i.e.

Mombasa/Block XVIII/486. The property is charged to Guardian Bank Ltd (formerly known as First National Finance Bank Ltd). This property is involved in the above case in which you are acting for Mr. Ibrahim Musa Mohamed”

We therefore do not see any fraud as alleged by the appellants. It is instructive to note that although the appellants pleaded fraud against the respondent, the appellant failed to prove the fraud. Suffice to state that the law places an obligation to the appellants to prove the fraud and the standard of proof in the allegations of fraud is higher than of civil cases but not as high as in criminal cases. The appellants did not discharge this burden. Besides contrary to what the appellant would like us to find the take-over did not as it were, free the 1st appellant of its financial obligations owed to First National Finance Bank Limited.

As to the complaint that the respondent unlawfully put undue pressure on the 1st appellant to the extent that he sold his property at an under –value, firstly, it is important to state the 1st appellant’s property was not sold by the bank in exercise of its statutory power of sale but it is the 1st appellant who identified a buyer, sold off his property and paid the bank the sum owed. A cheque payment of Kshs.8 million dated 25th May, 2005 was issued to the bank’s lawyers by the 1st appellant’s lawyers M/S Sachdeva & Co. Advocates. The 1st appellant went further to sign the transfer. It is our considered view that the pressure exerted on the 1st appellant was the usual pressure exerted by a financial institution on a client who has defaulted in making his payments. There was nothing untoward about the bank demanding its monies. It is also instructive to note that several letters were exhibited emanating from the 1st appellant indicating his willingness to sell Plot No. Mombasa/Block/XVIII/2486 in order to clear the debt owed to the FNFB. There is a letter of 23rd March, 2005 addressed to Sachdeva & Company Advocates (who was then acting for a prospective purchaser). The 1st appellant stated as follows:-

“RE: SALE OFFER: PLOT NO. MSA BLOCK XVIII/486

Refer to your letter dated 19th March, 2004.

After due consideration I, after having consulted my family have accepted your clients offer to purchase my property at the total sum of Kenya Shillings Eight Million, Five Hundred Thousand (Kshs.8,500,000.00) only.

Although the properties worth is much more than that, but due to the pressure from the bank and my family’s commitment, I have decided to go at a loss.

Your client should deposit the money with you so that I negotiate with the First National Bank about the loan payable and on the agreement of the offered sum you shall release directly to the bank on my written advice.

Yours faithfully,

Ibrahim Musa Mohamed.”

There is also the letter of 31st March, 2004 under the hand of the 1st appellant and addressed to First National Bank Limited and reproduced herein:

Ibrahim Musa Mohamed

P.O box 90759

Mombasa

31st March, 2004

The Executive Director,

The First National Bank Kenya Ltd

Headquarters, Nairobi

Dear Sir,

RE: OVERDRAFT ACCOUNT NO. 4057-01, IBRAHIM MUSA & SONS PROPERTIES LIMITED (PROPOSAL TO SETTLE THE O/D A/C BY PAYMENT OF KSHS. 3,500.00.00)

I beg to address you on the above subject which has given me bad dreams and sleepless nights over the years not forgetting the enormous legal and court fees involved.

Over the years I have been trying to save my property from being auctioned by all means possible without success due to the fact that my companies which I used to trade in went under; I have even tried to sell the property to clear the loan without success due to the fact that the property is not situated in a prime area.

*I have now with some luck gotten very serious and interested buyers who have given me a proposal to buy the property for Kshs.8,500,000.00 through their Advocate, **Mr. Maghnan of Sachdeva and Company** of Mombasa. The Advocates letter of offer is hereby attached for your ref.*

After a lot of considerations about all the problems I have had about my children's education, two of which have joined form six at Makerere College , in Uganda and three in Secondary Schools in Kenya and other seven in primary, (I am polygamous) and others not employed, I have decided to accept the offer of Shs. 8,500,000.00 so that I can negotiate with the bank to allow me to pay sha.3,500,000.00 in full and final settlement, considering that I had already paid the bank over shs.6,000,000.00 before the property was put for auction.

I beg to be allowed to pay this amount only as the property is the only family house we have and the rest can take care of the family's education and maintenance.

If this proposal meets your kind consideration, then the money which is in the custody of the buyer's advocates shall be released to the bank directly.

I beg your kindest consideration on this my humble and yet very real and practical proposal.

Yours faithfully,

Ibrahim Musa Mohamed

cc. Sachdeva & Co.,

Advocates

Mombasa

It is clear from the above two letters that the 1st appellant had all the intention to dispose off the

charged property so as to off-set the sum owed. The 1st appellant was granted the indulgence to do so as otherwise the FNFB would have sold the charged property in exercise of its statutory power of sale.

The 1st appellant's other complaint as regards the letters is that they were written on a 'without prejudice' basis and hence should not have been produced in court. In rejoinder, Mr. Khagram cited the case of ***Tomlin vs Standard Telephones & Cables Ltd [1969] 3ALL ER 201*** wherein, the court rendered itself thus:

“what is the meaning of the words ‘without prejudice’, I think they mean without prejudice to the position of the writer of the letters if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.”

We are in agreement with the above position as the letters resulted into a new contract between the 1st appellant and the respondent and we find the High Court properly conducted itself in considering the letters written by the appellant in spite of the fact that they were written on a “without prejudice” basis. In any event they were tendered in evidence by the appellant but even if they were tendered by the respondents, the appellant did not object. Indeed, in the Plaintiff's list of documents dated 27th March, 2007 and filed in Court, the appellants included the

“letter from IBRAHIM MUSA dated 31st day of March, 2004 to Executive Director of First National Finance Bank Limited received by Guardian Bank Limited.”

This is the letter written by the 1st appellant and marked “without prejudice”. The appellant cannot therefore turn round and complain that these letters should not have been tendered in evidence. Accordingly, we find no merit in the appellant's arguments that these letters should not have been tendered in evidence.

For those reasons, we are in agreement with the learned High Court Judge's finding in dismissing the appellants' case. We too dismiss this appeal with costs.

Dated and delivered at Mombasa this 13th day of March 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR