IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 27 OF 2013

BETWEEN

MARIANO DINACCI……..…….APPELLANT

AND

ANGELO LATTINELI……..……..……RESPONDENT

(*Being an appeal from the judgment of the of the High Court of Kenya at Malindi (Meoli, J.) dated 13th December, 2012*

In

H.C. Civil Suit No. 10 of 2009.)

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JUDGMENT OF THE COURT

[1] The origin of the dispute leading to this appeal is an agreement which was entered into between ***Mariano Dinacci*** who is the appellant before us, and ***Angelo Lattineli*** who is the respondent. As per the plaint dated 18th February 2009, filed in the High Court at Malindi by the appellant, he loaned the respondent a sum of €41,322.00 and US $50,000 as a personal loan repayable at an interest rate of 9% per annum with effect from March 2007 till payment in full. The redemption date for the payment of the principal sum was not agreed upon but the respondent continued paying the interest on the principal sum until March 2008 when the appellant demanded payment of the principal amount. On 24th October 2008, the respondent wrote to the appellant through his advocate denying the validity and enforceability of the agreement. The appellant filed a suit for recovery of the principal sum maintaining that the respondent acknowledged the debt on 29th September 2008, and therefore the cause of action accrued by virtue of ***section 23(3)*** as read with ***sections 24*** and ***25*** of the Limitation of Actions Act.

[2] The respondent denied the appellant's claim through a defence filed on 3rd March 2009, stating at paragraph 4 and 5 as follows:

> *4. The defendant denies paragraph 4 and 5 of the plaint and puts the plaintiff to strict proof of the allegations thereof, but avers that if there is any loan agreement which is denied the said agreement was entered between the parties out of this court's jurisdiction and its enforcement cannot therefore be executed within the jurisdiction of this court.*

5. Further and in the alternative and without prejudice to the foregoing paragraph 3 and 4 above, the defendant avers that he has paid the entire loan to the plaintiff, a fact which the plaintiff acknowledged long before the institution of this suit, proof of which the defendant will produce at the hearing of this suit.

[3] During the trial before the High Court (*Meoli, J.*) the appellant and his wife ***Stephanie Livi*** testified in proof of the appellant's case. The appellant reiterated that he loaned the respondent 110,000,000 Lira which is equivalent to €41,322 and US $50,000. He produced an agreement in Italian which was signed on 10th March 2000. He produced two cheques drawn in his favour by the respondent on an Italian Commercial Bank for 110,000,000 Lira and 80,000,000 Lira. He admitted that the respondent paid him the interest on the principal sum in cash and in kind through goods from a supermarket owned by the respondent. After a period of eight years, the appellant demanded payment of the principal sum and the respondent offered him a house instead of cash. The respondent later withdrew the offer and advised the appellant that he would sell the house and thereafter pay him. However, no payment was received from the respondent. The appellant denied that the principal amount was repaid to him. The appellant's wife confirmed that her husband had loaned some money to the respondent although she was not privy to the precise details. She also confirmed that she used to collect goods from the respondent's supermarket and sign for the goods, but denied collecting any money from the respondent.

[4] On his part the respondent testified that the appellant was initially one of his partners in the supermarket business until the respondent bought him off; that in 2000, the respondent was in Italy with the appellant, when the appellant loaned him US $50,000 and 80,000,000 Lira; that the respondent repaid the appellant US $50,000 and the equivalent of about US $70,000 in Euros and Kenya shillings; that in addition, the appellant also took some goods from the supermarket as payment in kind; that the appellant later demanded further payment from the respondent contending that he had lost interest equivalent to €65,803 because of inflation; that the respondent declined to pay the amount maintaining that he had paid interest at the agreed rate of 9%; that the respondent was agreeable to paying him an extra amount of €30,000 and offered the appellant his house for that amount. The respondent indicated that if he sold the house he would give the appellant the amount of €30,000.

[5] In her judgment, the learned Judge identified the main issues for determination as the existence of the contract between the appellant and the respondent; the terms of such contract including whether the appellant was entitled to place an arbitrary redemption date and demand payment of the principal after the expiry of such date; whether the respondent had paid any amount in settlement of the debt, if any, and whether the respondent is liable to the appellant for the amount claimed. The learned Judge found that there was an agreement dated 10th March 2000 according to which the parties were to agree on a redemption date in the future. However, the court found the evidence of the appellant falling short of discharging the burden of proof in regard to the terms of agreement and the amount owed by the respondent. She therefore found the respondent not liable and dismissed the appellant's suit thereby giving rise to this appeal.

[6] In his memorandum of appeal, the appellant raised eight grounds which can be paraphrased as follows: that the conclusion that the agreement between the appellant and the respondent was unenforceable, was contradictory given the finding that the agreement was valid; that having found that the expiration of the agreement was subject to determination in the future, the Judge erred in failing to find that this process was commenced by the appellant and that the offer made by the respondent to transfer his house to the appellant, amounted to an acknowledgment of the expiration of the agreement. Further, that the Judge erred, in finding that there was conflict on the issue of the rate of interest payable on the loan or the full payment of the interest; in finding, that the appellant was guilty of laches; in failing to find that the burden of proof of the existence of the loan shifted from the appellant to the respondent when the respondent alleged that he paid more than the interest that was due to the appellant.

[7] On 27th May 2014, it was agreed that the appeal be canvassed by way of written submissions. However, only the appellant filed submissions and authorities, while counsel for the respondent opted to rely on the decision of the High Court. For the appellant, it was submitted that the agreement signed between the appellant and the respondent was enforceable as it contained all the necessary ingredients of

a contract and the learned Judge therefore erred in failing to enforce the same; that though the contract did not provide for the redemption date, the respondent continued to pay the interest through cash and kind; that the failure to agree on the redemption date could not frustrate the contract as the parties provided for a future contract to set out the terms of the settlement of the debt and therefore the court should have endeavored to maintain the performance of the contract. In this regard, the case of **John Njoroge Michuki-vs-Shell Limited C.A no. 227 of 1999** was relied upon to emphasize that the court should give effect to the intention of the parties and not overrule clearly expressed intention.

[8]. Further, it was pointed out that although the appellant argued that the interest rate agreed upon was 9% per annum while the Respondent maintained that the compound interest for the whole amount was 10%, the agreement indicated the interest simply as 9%. The appellant relied on ***section 97(1)*** of the Evidence Act for the proposition that where the terms of a contract have been reduced in writing, no evidence was to be given in proof of the terms of such contract other than the contract document. It was reiterated that although the respondent maintained that he paid the principal sum advanced, he produced no evidence to show any such payments and in fact admitted on cross examination that the evidence he produced was to show payment of interest.

[9] In regard to laches, it was submitted that the parties had agreed that the redemption date was to be determined in future, and the cause of action arose when the demand for repayment of the advanced money was made and the respondent defaulted. The claim having been brought immediately after the demand was made, the issue of limitation did not arise. The appellant conceded that it had taken him eight years to demand repayment of the advanced money, but this did not provide a sufficient basis to fault his demand for repayment of the advanced money.

[10] The appellant submitted that the offer by the respondent of a house to the appellant amounted to an acknowledgement of the debt as such transfer would have relieved the respondent of his obligations to repay the loan. The case of **Choitram-vs-Nazari [1984] KLR 327** was cited. He further stated that all that the respondent had paid in regard to the repayment of the loan was the interest that was calculated twice a year and paid through the goods the appellant collected from the respondent's supermarket, if there was a shortfall the same was paid in cash.

[11] The learned Judge was faulted for holding that the burden of proof was upon the appellant who was claiming interest from the respondent to prove that he had not been paid the interest, as the burden ought to have been on the respondent who claimed to have paid more than the interest that the appellant demanded to establish such payments. That there was a legitimate expectation that the respondent would maintain the records of payments and produce them.

[12] Finally, the appellant submitted that the respondent was in clear breach of the contract as he had failed to honour his obligations, and by absolving the respondent of the duty to pay the principal sum, the trial court had by its judgment, unwittingly allowed the respondent to unfairly enrich himself to the detriment of the appellant, hence the appeal should be allowed.

[13] The appeal before us being a first appeal, our mandate is to reconsider and re-evaluate the evidence and come to our own conclusion taking into account that the trial Judge had the advantage of seeing and assessing the demeanor of the witnesses. **Selle & Another v Associated Motor Boats Company Ltd [1968] EA 123**. We are also mindful of the fact that a Court of Appeal will not normally interfere with the finding of the trial court unless it is based on no evidence or misapprehension of the evidence, or the Judge is demonstrated to have acted on wrong principles in reaching the findings (**Chemangong v R [1984] KLR 611**).

[14] We have reconsidered and re-evaluated the evidence which was adduced before the trial Judge, and the submissions as well as the authorities that were cited before us. In our view, although the learned Judge identified the existence of the contract between the appellant and the respondent as an issue, we find that from paragraph 3 and 8 of the plaint, the appellant sought judgment against the respondent for the sum of €.41,322 and US $50,000 as amount due and owing in regard to a personal loan advanced to the respondent. Although at paragraph 3, the appellant pleaded that the interest applicable was 9% per

annum, the appellant did not pray for interest at this rate but prayed for interest as per prayer 8 (c) at court rates.

[15] Secondly, although at paragraph 3 of the defence, the respondent denied the appellant's claim, at paragraph 5 of the defence the respondent contended that he had repaid the entire loan to the appellant. This fact was averred to by the respondent under oath in his affidavit sworn on 27th July 2009, in response to an application for summary judgment that was filed by the appellant. In the affidavit the respondent admitted having received a loan of 80,000,000 Lira equivalent to €41,322 and a second loan of US $50,000 both of which he claimed to have repaid in full. In his evidence during the trial, the respondent stated at page 56 of the record of appeal as follows:

> *"…In 2000, he lent me money, we were in Italy, the loan was US $50,000 and 80,000,000 Lira, we did not write an agreement. I gave him two cheques for that sum. Then here in Malindi we reduced the agreement in writing…"*

[16] Clearly, there was no dispute that the respondent received the sum of €41,322 and US $50,000 as a loan. The issue was not the existence of the agreement or receipt of the money as this was no longer in issue but the terms under which the loan was given and whether the respondent had repaid the appellant the sum of €41,322 and US $50,000 lent to him. Although the written agreement makes no reference to US $50,000, the respondent in his own evidence in court stated that the agreement regarding the two loans were initially oral but were later reduced to writing and identified the written agreement as the one produced in court. Therefore the intention must have been that the written agreement apply to both loans, and it is not surprising that the parties proceeded in the trial as if the agreement was for 190,000,000 Lira and not 100,000,000 Lira as expressed in the written document.

[17] In the judgment, the learned Judge rendered herself as follows:

> *"As I have indicated elsewhere in this judgment, the plaintiff has failed to show his entitlement to the specific sum of payment demanded from the defendant in the plaint. It was not the duty of the defendant to prove that he has paid the debt but that of the plaintiff who dragged him to court to establish his claim. The burden of proof lies on the one who avers…"*

[18] ***Section 107(1)*** of the Evidence Act provides as follows:

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist****"*

[19] Under ***section 109*** of the Evidence Act

> "***The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person"***

[20] The evidential burden of proof of admissibility is provided for under ***section 110*** of the Evidence Act that provides as follows:

> ***"110 Proof of admissibility The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence"***

[21] Applying the above provisions, the appellant had the burden to lay the basis for his claim by proving that he had given a loan to the respondent. This burden was discharged when the respondent admitted having been loaned the money by the appellant. Since the respondent alleged in his defence that he had repaid the loan, the burden shifted to the respondent to prove this fact. Therefore, the learned Judge erred in finding that the appellant did not discharge the burden of proof in this regard. The appellant did not need to produce any statement of account as the respondent clearly admitted having

received the amount claimed. Moreover, as observed by the learned Judge, this was not a commercial loan agreement but a gentleman's agreement. It was not therefore surprising that the documents produced were rather casual with regard to the terms of the agreement, nor would it be fair to draw any adverse inference from that weakness. It suffices that the agreement confirms that there was money lent to the respondent by the appellant. We find that the trial Judge misdirected herself in regard to the burden of proof.

[22] In his evidence the respondent asserted that he repaid the appellant US$50,000 and also Kenya Shillings equivalent to US $70,000. He produced documents which he relied upon as evidence of full repayment of the loan advanced to him. His evidence in this regard was as follows:

> *"… I have paid the plaintiff in full. When I paid I also paid interest. We had agreed on 9% but I was paying 10%. The plaintiff also took goods from my supermarket as payment in kind. Twice a year we totalled and I paid him as interest (sic). Here are the documents regarding the transactions. (Defence documents ALI (a)-(f)). At document (e) the balance was 82,184 and at (f) 82,184 is carried over. I paid in full and he signed in line 1."*

[23] In regard to those documents, the learned Judge stated as follows:-

> *"…the defence documents which the plaintiff says are evidence of interest only are difficult to follow as they appear to contain sums in what may be Kenya Shillings and or Euros, and some explanations seemingly in Italian Language. Ditto the plaintiff's admitted statement ALI (g) the same is in Italian. The plaintiff claimed it represents payment of interest while the defendant claimed it comprises the claim for €65,803.9 which the plaintiff allegedly initially demanded from the defendant as loss due to fluctuating exchange rates,…the plaintiff did not produce any statement or tabulated calculations of the payment received from the defendant and neither is it possible to tell the actual sum of interest admitted by him as paid…"*

[24] The rate of interest indicated in the written agreement of 9% is rather vague as it is not clear what the percentage is pegged on. However, notwithstanding the evidence that was adduced by the witnesses regarding the interest, the appellant claimed interest at court rates and therefore the rate of the interest indicated in the contract was not an issue for determination by the court as the court had the discretion to award interest at court rates.

[25] Like the learned Judge, we have found the documents that were produced by the respondent as exhibits ALI (a) - (g) rather difficult to follow. The question is who should take responsibility for this weakness? All the documents were produced by the respondent in proof of his contention that he had repaid the debt in full. The documents were therefore part of his evidence and he had the responsibility to ensure that the documents were translated into the language of the court. Any inadequacy in this evidence could only in the first place impact on the defence as it was for the respondent to prove that he had repaid the debt and not vice versa. Indeed, it was easy for the respondent to state in his defense that he had repaid the loan but this had to be accompanied with cogent evidence to prove this assertion in order to discharge the evidential burden that had shifted to the respondent.

[26] The agreement did not provide for a specific time for repayment of the principal sum but stated that:

> *"…the parties, lately will agree the terms of expiring and eventual extension of the debt…"*

[27] Therefore, the written agreement allowed the parties to agree on the terms of the expiry of the contract at a future date. Eight years down the road, the parties had come to no such agreement. If the respondent started repaying the principal sum as he alleges, before any agreement on the redemption date, then it was upon the respondent to prove this. However, when demand was made on 22nd September 2008, for payment of the principal sum, the respondent immediately responded through a letter dated 29th September, 2008. It is interesting to note that the respondent did not respond that he had repaid the principal amount as he now alleges but replied that he was selling his house implying that he was making

arrangements to pay. The second response dated 24th October 2008, came from the respondent's counsel who again made no reference to payment of the principal sum but challenged the enforceability of the contract on the ground of limitation and jurisdiction. Surely, if the respondent had repaid the principal sum in full as he claims, would that not have been the first issue he would raise when demand for repayment was made?

[28] As regards laches and limitation of the appellant's claim, we concur with the interlocutory ruling that was made (*Omondi, J.*), that the notice dated 22nd September, 2008 from the appellant's counsel demanding the principal sum and the respondent's failure to comply with the demand crystalized the appellant's cause of action, and therefore time started running from the date of the demand. In our view, in the absence of an agreement, the appellant was entitled to force redemption by resorting to court after giving due notice.

[29] Laches is defined in Black's Law Dictionary 9th Edition as:

> *(i). Unreasonable delay in pursuing a right or claim- almost always an equitable one - in a way that prejudices the party against whom relief is sought.*

(ii). The equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought.

[30] While it is true that the appellant took eight years before forcing redemption, he cannot be vilified for that delay as it appears to have been consensual given that the respondent's evidence of alleged repayment of the debt were all dated between January and April 2008. The respondent cannot therefore rely on his own default to escape his obligation to repay the loan nor can he claim to have been prejudiced. The appellant's claim was simply for refund of the principal sum lent to the respondent which was enforcement of a contractual right. Therefore the issue of specific performance of the contract did not arise nor was the suit for enforcement of an equitable remedy.

[31] With respect we must depart from the finding of the learned Judge that the appellant failed to show his entitlement to the money demanded as this finding was based on a misapprehension of the law and the evidence. We come to the conclusion that there was clear and uncontroverted evidence that the appellant extended two loans to the respondent which were €41,322 and US $50,000 and that the respondent failed in his attempt to demonstrate his defence that he had repaid the loans.

[32] Accordingly, we allow the appeal set aside the judgment of the learned Judge dismissing the appellant's suit, and substitute thereof an order for judgment in favour of the appellant in the sum of €41,322 and US $50,000 (or its equivalent at current exchange rate). We award the appellant costs of the suit in the High Court and costs of this appeal. As regards interest, we award the same on the decretal sum at court rates from the date of the judgment of the High Court. Those shall be the orders of this Court.

Dated and delivered at Malindi this 3rd day of October, 2014

H.M. OKWENGU

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JUDGE OF APPEAL

ASIKE -MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR